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NORTH CAROLINA REPORTS.

VOL. 133.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

AUGUST TERM, 1903.

BY

ZEB V. WALSER,

STATE REPORTER.

(VOL. VII.)

RALEIGH:
E. M. UZZELL & CO., STATE PRINTERS AND BINDERS.
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3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
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2 " "	"	24	"	1 " Eq.	"	54	"
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4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

AUGUST TERM, 1903.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

WALTER A. MONTGOMERY, PLATT D. WALKER,
ROBERT M. DOUGLAS,* HENRY G. CONNOR.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

ZEB V. WALSER.

CLERK OF THE SUPREME COURT:

THOS. S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

---

*Justice Douglas was absent on account of illness from November 25th until the end of the Term.

108105

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

Name.	*District.*	*County.*
George H. Brown	First	Beaufort.
Robert B. Peebles	Second	Northampton.
Henry R. Bryan	Third	Craven.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
William R. Allen	Sixth	Wayne.
T. A. McNeill	Seventh	Robeson.
Walter H. Neal	Eighth	Scotland.
Thomas J. Shaw	Ninth	Guilford.
Benjamin F. Long	Tenth	Iredell.
Erastus B. Jones	Eleventh	Forsyth.
William A. Hoke	Twelfth	Lincoln.
W. B. Councill	Thirteenth	Watauga.
M. H. Justice	Fourteenth	Rutherford.
Frederick Moore	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
George W. Ward	First	Pasquotank.
Walter E. Daniel	Second	Halifax.
L. I. Moore	Third	Pitt.
Charles C. Daniels	Fourth	Wilson.
Rodolph Duffy	Fifth	New Hanover.
Armistead Jones	Sixth	Wake.
C. C. Lyon	Seventh	Bladen.
L. D. Robinson	Eighth	Anson.
Aubry L. Brooks	Ninth	Guilford.
William C. Hammer	Tenth	Randolph.
S. P. Graves	Eleventh	Surry.
James L. Webb	Twelfth	Cleveland.
Moses N. Harshaw	Thirteenth	Caldwell.
J. F. Spainhour	Fourteenth	Burke.
Mark W. Brown	Fifteenth	Buncombe.
Thad. D. Bryson	Sixteenth	Swain.

LICENSED ATTORNEYS.

AUGUST TERM, 1903.

ADAMS, STONEWALL J.....Wake County.
ADAMS, THADDEUS A.....Nash County.
ALLEN, TALBOT M.....Wake County.
ALLEN, THOMAS.....Dillon, S. C.
AVERITT, HERSCHELL S.....Cumberland County.
BALLOU, ROBERT L.....Ashe County.
BODDIE, WILLIAM W.....Franklin County.
BRITTAIN, HERBERT I.....Bertie County.
BRITTAIN, THEODORE G.....Pitt County.
BROWN, THOMAS E.....New Hanover County.
CHAMBERS, SIDNEY C.....Durham County.
CLEMENT, HAYDEN.....Rowan County.
COLLIER, JAMES L.....Cumberland County.
DUNCAN, JULIUS F.....Carteret County.
DUNN, RAYMOND C.....Halifax County.
DUNN, SAMUEL A.....Halifax County.
EHRINGHAUS, JOHN C. B.....Pasquotank County.
FLANAGAN, ROY C.....Pitt County.
FULLER, THOMAS S.....Durham County.
GIBSON, EDWARD H.....Scotland County.
GILLIAM, MOSES B.....Bertie County.
GILREATH, CHARLES G.....Wilkes County.
GOODMAN, LOUIS.....New Hanover County.
GREEN, ERNEST M.....Craven County.
GRIFFIN, FAIRLEY F.....Union County.
GRIFFIN, WILLIAM E.....Wake County.
HERNDON, CARL H.....Alamance County.
HUDSON, THOMAS F.....Rowan County.
KEENER, WALTER N.....Lincoln County.
KUYKENDALL, JAMES S.....Guilford County.
LARKINS, EBURN L.....Pender County.

LONG, JACOB E.....Guilford County.
LUCAS, WILLIAM A.....Wilson County.
LYON, FLETCHER H.....Wilkes County.
LYON, WINFIELD H., JR.....Wake County.
MCRAE, JOHN A.....Anson County.
MCRORIE, WILLIAM C.....Union County.
MONTEATH, ARCHIBALD D.....Buncombe County.
MOORE, LEONIDAS J., JR.....Craven County.
MORRIS, ROBERT E.....Rutherford County.
MORROW, DECATUR F.....Rutherford County.
MULL, ODES M.....Cleveland County.
NEWELL, SPEARMAN A.....Franklin County.
PIERCE, CHARLES C.....Nash County.
PRIVOTT, WILLIAM S .....Chowan County.
RAMSEY, JOSEPH B.....Nash County.
READE, ROBERT P.....Person County.
REAVIS, WADE .....Yadkin County.
ROUNTREE, JACK R.....Orange County.
SAMS, ANDREW F.....Wake County.
SCHENCK, MICHAEL .....Guilford County.
SELLARS, JOSIAH H.....New Hanover County.
SHORT, HENRY B.....Columbus County.
SIKES, JOHN C., JR.....Union County.
STARR, ALBERT L.....Catawba County.
STEWART, HAMILTON V.....Guilford County.
THIGPEN, KENNETH B.....Edgecombe County.
VAUGHAN, LEON T.....Halifax County.

Heretofore the Court has not taken into consideration, upon these examinations, defects in spelling or handwriting, but it will do so hereafter; it thinks that an applicant for law license, as a part of his qualification, should at least be able to spell words ordinarily in legal use and to write a legible hand.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING AND FALL OF 1904.

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the fourth Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	February Term.	Fall Term.
First District	February 2.	August 23.
Second District	February 9.	August 30.
Third District	February 16.	September 6.
Fourth District	February 23.	September 13.
Fifth District	March 1.	September 20.
Sixth District	March 8.	September 27.
Seventh District	March 15.	October 4.
Eighth District	March 22.	October 11.
Ninth District	March 29.	October 18.
Tenth District	April 5.	October 25.
Eleventh District	April 12.	November 1.
Twelfth District	April 19.	November 8.
Thirteenth District	April 26.	November 15.
Fourteenth District	May 3.	November 22.
Fifteenth District	May 10.	November 29.
Sixteenth District	May 17.	December 6.

SUPERIOR COURTS.

Spring Terms date from January 1st to June 30th.
Fall Terms date from July 1st to December 31st.

(The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold).

FIRST JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge W. A. Hoke.
FALL TERM, 1904—Judge E. B. Jones.

Beaufort—Feb. 15 (2); †April 18 (1); *May 16 (1); †Oct. 17 (2); Dec. 5 (3).
Currituck—Feb. 29 (1); Sept. 5 (1).
Camden—Mar. 7 (1); Sept. 12 (1).
Pasquotank—Mar. 14 (2); May 30 (2), Sept. 19 (1); Nov. 28 (1).
Perquimans—Mar. 28 (1); Sept. 26 (1).
Chowan—April 4 (1); Oct. 3 (1).
Gates—April 11 (1); Oct. 10 (1).
Washington—April 25 (1); Oct. 31 (1).
Tyrrell—May 2 (1); Nov. 7 (1).
Hyde—May 9 (1); Nov. 21 (1).
Dare—May 23 (1); Nov. 14 (1).

SECOND JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge W. B. Council.
FALL TERM, 1904—Judge W. A. Hoke.

Northampton—‡Jan. 25 (1); Mar. 28 (2); ‡Aug. 1 (1); Oct. 31 (2).
Halifax—*Feb. 1 (1); Mar. 7 (2); June 6 (2); Aug. 22 (1); Nov. 28 (2).
Warren—Feb. 15 (1); June 20 (1); Sept. 19 (2).
Bertie—‡Feb. 22 (1); May 2 (2); ‡Sept. 12 (1); Nov. 14 (2).
Hertford—Feb. 29 (1); April 25 (1); *Aug. 15 (1); Oct. 24 (1).

THIRD JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge M. H. Justice.
FALL TERM, 1904—Judge W. B. Council.

Pitt—Jan. 18 (2); †Mar. 21 (2); April 25 (2); Sept. 19 (1); †Nov. 7 (2).
Craven—†Feb. 15 (1); *April 11 (1); †May 9 (2); Oct. 3 (2); Nov. 21 (2).
Greene—Feb. 29 (1); Sept. 5 (1); Dec. 5 (2).
Carteret—Mar. 14 (1); Oct. 17 (1).
Jones—April 4 (1); Oct. 31 (1).
Pamlico—April 18 (1); Oct. 24 (1).

FOURTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge Frederick Moore.
FALL TERM, 1904—Judge M. H. Justice.

Franklin—Jan. 25 (2); April 18 (2); Oct. 17 (2).
Wilson—†Feb. 8 (2); May 16 (1); *Sept. 5 (1); †Nov. 14 (2); *Dec. 12 (1).
Vance—Feb. 22 (2); May 23 (1); Oct. 3 (2).
Edgecombe—Mar. 7 (1); †April 4 (2); Sept. 12 (1); †Oct. 31 (1).
Nash—Mar. 14 (1); May 2 (2); Aug. 29 (1); Nov. 28 (2).
Martin—Mar. 21 (2); Sept. 19 (2).

FIFTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge G. S. Ferguson.
FALL TERM, 1904—Judge Frederick Moore.

Pender—Jan. 11 (1); Feb. 29 (1); Sept. 5 (1).
Duplin—Jan. 18 (1); Mar. 14 (1); Aug. 29 (1); Oct. 31 (2).
New Hanover—Jan. 25 (2); April 4 (2); May 30 (1); June 27 (1); Sept. 26 (1); Oct. 17 (2); Nov. 28 (1).
Sampson—Feb. 15 (2); May 2 (2); Oct. 3 (2).
Lenoir—Mar. 21 (2); June 13 (2); Sept. 12 (2); Nov. 14 (2).
Onslow—April 25 (1); Dec. 5 (2).

SIXTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge G. H. Brown.
FALL TERM, 1904—Judge G. S. Ferguson.

Wake—Jan. 11 (2); †Feb. 29 (2); Mar. 28 (2); †April 25 (3); *July 11 (2); *Sept. 26 (2); †Oct. 24 (3).
Wayne—Jan. 25 (2); April 18 (1); Sept. 12 (2); Nov. 28 (1).
Harnett—Feb. 8 (2); May 23 (1); Aug. 29 (1); Nov. 14 (2).
Johnston—Mar. 14 (2); Sept. 5 (1); Nov. 28 (2).

SEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge R. B. Peebles
FALL TERM, 1904—Judge G. H. Brown.

Cumberland—*Jan. 18 (1); ‡Feb. 22 (1); †Mar. 28 (1); May 2 (3); *Aug. 29 (1); †Oct. 24 (2); *Nov. 21 (1).
Robeson—*Feb. 8 (2); †April 4 (2); ‡May 23 (1); *July 25 (1); †Sept. 12 (2); *Nov. 7 (2); ‡Dec. 5 (1).
Columbus—Feb. 29 (1); April 18 (2); Sept. 5 (1); Nov. 28 (1).
Bladen—March 7 (2); Oct. 10 (2).
Brunswick—Mar. 21 (1); Sept. 26 (1).

EIGHTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge H. R. Bryan.
FALL TERM, 1904—Judge R. B. Peebles.

Union—*Jan. 11 (1); †Feb. 15 (2); *Mar. 14 (1); *Aug. 1 (1); †Aug. 22 (2); *Oct. 31 (2).
Moore—†Jan. 18 (2); *April 18 (1); †May 9 (2); *Aug. 15 (1); †Sept. 19 (1); *Nov. 21 (1).
Chatham—Feb. 1 (1); May 2 (1); †Aug. 8 (1); Nov. 14 (1).
Anson—*Feb. 8 (1); †April 11 (1); †May 23 (1); *Sept. 12 (1); †Oct. 10 (2).
Richmond—*Feb. 29 (1); †Mar. 28 (2); *Sept. 5 (1); Sept. 26 (2).
Scotland—†Mar. 7 (1); *April 25 (1) †Oct. 24 (1); *Nov. 28 (1).

NINTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge C. M. Cooke.
FALL TERM, 1904—Judge H. R. Bryan.

Durham—*Jan. 11 (1); †Jan. 25 (2); †Mar. 21 (2); *May 16 (1); †Aug. 29 (1); †Oct. 3 (2); *Dec. 5 (1).
Guilford—*Jan. 18 (1); †Feb. 15 (2); †April 18 (1); *May 9 (1); †June 13 (2); *Aug. 22 (1); †Sept. 19 (2); *Oct. 24 (1); †Oct. 31 (1); †Dec. 12 (2).
Granville—Feb. 8 (1); April 25 (2); Aug. 1 (1); Nov. 21 (2).
Alamance—Feb. 29 (2); †May 10 (1); Sept. 5 (2); *Nov. 7 (1).
Orange—Mar. 14 (1); †May 23 (1); Aug. 8 (1); Oct. 17 (1).
Person—April 11 (1); †June 6 (2); Aug. 15 (1); Nov. 14 (1).

TENTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge O. H. Allen.
FALL TERM, 1904—Judge C. M. Cooke.

Montgomery—*Jan. 25 (1); †April 18 (1); Sept. 26 (2).
Iredell—Feb. 1 (2); May 23 (2); Aug. 8 (2); Nov. 7 (2).
Rowan—Feb. 15 (2); May 9 (2); Sept. 5 (2); Nov. 21 (2).
Davidson—Feb. 29 (2); †April 25 (1); Aug. 22 (2).
Stanly—†Mar. 14 (1); *July 18 (1); †Sept. 19 (1); *Dec. 19 (1).
Randolph—Mar. 21 (2); July 25 (2); Dec. 5 (1).
Davie—April 4 (2); Oct. 10 (2).
Yadkin—May 2 (2); Oct. 24 (2).

ELEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge W. R. Allen.
FALL TERM, 1904—Judge O. H. Allen.

Wilkes—*Feb. 1 (1); †June 6 (1); Aug. 8 (2); †Oct. 24 (2).
Forsyth—*Feb. 15 (2); †Mar. 14 (2); May 23 (2); *July 25 (1); †Sept. 12 (2); *Oct. 10 (1); †Dec. 5 (2).
Rockingham—Feb. 29 (2); †June 13 (1); *Aug. 1 (1); Nov. 7 (2).
Alleghany—Mar. 28 (1); Aug. 22 (1).
Caswell—April 18 (1); Oct. 17 (1).
Surry—‡April 25 (2); †Aug. 29 (2); Nov. 21 (2).
Stokes—May 9 (2); Sept. 26 (2).

TWELFTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge T. A. McNeill.
FALL TERM, 1904—Judge W. R. Allen.

Mecklenburg—‡ Jan. 18 (2); *Feb. 15 (2); ‡Mar. 14 (2); April 25 (2); June 6 (2); †July 18 (2); *Aug. 15 (2); Sept. 26 (4); Nov. 28 (2).

Cabarrus—Feb. 1 (2); May 9 (2); Aug. 29 (1); Oct. 24 (2).

Gaston—Feb. 29 (2); May 23 (2); Sept. 12 (2); Nov. 21 (1).

Cleveland—Mar. 28 (2); Aug. 1 (2); Nov. 7 (2).

Lincoln—April 11 (2); Sept. 5 (1); Dec. 12 (1).

THIRTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1904 -Judge W. H. Neal.
FALL TERM, 1904—Judge T. A. McNeill.

Catawba—Feb. 8 (2); †May 9 (2); July 11 (2); Oct. 31 (2).

Alexander—Feb. 22 (1); Oct. 3 (1).

Caldwell—Feb. 29 (2); Sept. 19 (2); †Nov. 28 (2).

Watauga—Mar. 28 (2); June 6 (1); Aug. 8 (2).

Ashe—April 11 (2); July 25 (2); Oct. 10 (2).

Mitchell—May 23 (2); Nov. 14 (2).

FOURTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge T. J. Shaw.
FALL TERM, 1904—Judge W. H. Neal.

McDowell—Feb. 22 (2); Aug. 8 (2); Oct. 17 (2).

Henderson—*Mar. 7 (1); †May 16 (2); *Sept. 19 (2); ‡Nov. 7 (2).

Rutherford—March 14 (2); †Sept. 5 (2); Nov. 21 (2).

Polk—Mar. 28 (2); Oct. 3 (1).

Burke—April 11 (2); †June 6 (2); †Oct. 10 (2).

Yancey—April 25 (2); Dec. 5 (2).

FIFTEENTH JUDICIAL DISTRICT.

SPRING TERM. 1904—Judge B. F. Long.
FALL TERM, 1904—Judge T. J. Shaw.

Madison—†Jan. 25 (2); *Feb. 29 (2); †May 9 (2); *Aug. 15 (2); †Oct. 24 (2).

Buncombe—*Feb. 8 (3); ‡Mar. 14 (4); April 25 (2); †May 30 (4); *Aug. 1 (2); †Sept. 12 (4); *Nov. 14 (2); †Dec. 5 (2).

Transylvania—April 11 (2); Aug. 29 (2); Nov. 28 (1).

SIXTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1904—Judge E. B. Jones.
FALL TERM, 1904—Judge B. F. Long.

Haywood—Feb. 8 (2); May 9 (2); Sept. 26 (2).

Jackson—*Feb. 22 (2); †May 23 (2); Oct. 10 (2).

Swain—Mar. 7 (2); †July 25 (2); Oct. 24 (2).

Graham—Mar. 21 (2); Sept. 5 (2).

Cherokee—April 4 (2); Aug. 8 (2); Nov. 7 (2).

Clay—April 18 (1); Sept. 19 (1).

Macon—April 25 (2); Aug. 22 (2); †Nov. 21 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

CHARLES H. SIMONTON, Judge, Charleston, S. C.

DISTRICT COURTS.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

Terms.—Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

Terms.—Elizabeth City, third Monday in April and October.
New Bern, fourth Monday in April and October.
Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

OFFICERS.

Harry Skinner, United States District Attorney, Raleigh.
Oscar J. Spears, Assistant United States District Attorney, Lillington.
Henry C. Dockery, United States Marshal, Rockingham.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.

DEPUTY CLERKS.

George L. Tonnoffski, Raleigh.
W. H. Shaw, Deputy Clerk for both Circuit and District Courts, Wilmington.
George Green, New Bern.
John P. Overman, Elizabeth City.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at same time and place, as follows:
Greensboro, first Monday in April and October, Samuel L. Trogden, Clerk.
Statesville, third Monday in April and October, H. C. Cowles, Clerk.
Asheville, first Monday in May and November, W. S. Hyams, Clerk.
Charlotte, second Monday in June and December, H. C. Cowles, Clerk.

A. E. Holton, United States District Attorney, Winston.
A. H. Price, Assistant United States District Attorney, Salisbury.
J. M. Milliken, United States Marshal, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

AUGUST TERM, 1903.

GRAY v. HAWKINS.

(Filed September 22, 1903.)

DEEDS—*Specific Performance—Estates—Remainders—The Code, secs. 1335, 1280.*

Under the provisions of the deed as set out in this case, two of the grantees, after the death of the other grantee, without issue, and the death of the grantor, can make a fee-simple title to the land in controversy.

ACTION by Nathaniel Gray against T. W. Hawkins, heard by Judge *Walter H. Neal* at July Term, 1903, of the Superior Court of MECKLENBURG County.

This is a controversy submitted to the Court without action on a case agreed. The facts material to be considered in determining the controversy are: That on the 14th of August, 1890, William G. Gray, Sr., executed and delivered to the plaintiffs, Nathaniel Gray, W. G. Gray, J. N. B. Gray and John W. Gray, a deed for the real estate described therein, known as the "Moody property," which deed was duly probated and recorded. The consideration upon which

the deed was made was natural love and affection, "and also one pepper corn to the party of the first part." The *habendum* of the deed is in the following words: "To have and to hold the aforegranted premises . . . to the said Nathaniel Gray for and during the term of his natural life, . . . and after his death to the said John W. Gray, W. G. Gray, Jr., and J. N. D. Gray and their heirs and assigns forever, share and share alike; and if either of the last three named should die in the lifetime of the said Nathaniel Gray without leaving issue living at such his death, then his part as then held, owned and enjoyed by him shall go to and vest in the survivor or survivors, as the case may be, and to be held, not subject to the debts of either of the said remaindermen, except as to the surplus of rent as to each share over $500; the object of this deed, in part, being the support and maintenance of the said John, William G. and J. N. B. Gray, pursuant to section 1335 of The Code of North Carolina, and to that end no trustee is now appointed, to the end that upon the death of the said Nathaniel Gray a trustee, to give bond, may be appointed by the Superior Court." At the date of the execution of the said deed all of the said grantees named therein were infants except Nathaniel Gray. John W. Gray, one of the grantees named in the deed, has since died while an infant, intestate, without leaving issue, and all the other grantees are now over twenty-one years of age and living. The grantor, William G. Gray, is now dead. On the 19th of June, 1903, the plaintiffs and the defendant entered into a contract, wherein the plaintiffs contracted to sell and the defendant agreed to buy the lot known as the "Moody property," and the defendant therein agreed to pay to the plaintiffs, upon the delivery of the deed, the consideration agreed upon and set out in said contract. Thereafter the plaintiffs prepared a deed in fee-simple to the defendant, signed by themselves, containing full covenants and

warranties, and after duly executing the same before an officer having authority to take acknowledgment of deeds, tendered said deed to the defendant, but he refused to accept the same or to pay the purchase money agreed upon. The plaintiffs are still ready to tender said deed to the defendant, who refuses to accept the same or to pay the purchase money, for that the deed tendered will not convey to or secure to the defendant an indefeasible title to the land embraced therein. The defendant appealed from a judgment for the plaintiff.

Hugh W. Harris, for the plaintiff.
T. W. Hawkins, for the defendant.

CONNOR, J., after stating the facts. The sole question presented for determination is whether the deed tendered by the plaintiffs to the defendant will convey to and vest in the defendant an absolute and indefeasible title to the land. His Honor held in the affirmative and rendered judgment accordingly, from which the defendant appealed.

The deed vests in Nathaniel Gray an estate for his life, and in the others a vested remainder in fee, subject to be defeated and vest in the survivor or survivors as to such of them as should die during the life of Nathaniel without issue living at such his death. This is clearly an attempt to limit a fee after a fee-simple, which could not be done at common law. As is said by *Ashe, J.,* in *Smith v. Brisson,* 90 N. C., 284, "There was no way known to the common law by which a vested fee-simple could be put an end to, and another estate put in its place; and the reason is, because no freehold could pass without livery of seizin, which must operate immediately or not at all." After the Statute of Uses, 27 Henry VIII., it was held that a deed operating under the statute could be made to commence *in futuro* without any immediate transmutation of possession, as by bargain and sale, or covenant

to stand seized to uses. From this arose the doctrine of shifting uses and conditional limitations. When created by deed such interests or estates are conditional limitations, and by will they are executory devises.

The interest or estate created by the deed before us is a conditional limitation. Immediately upon the death of John W. Gray the use shifted to the surviving grantees and they became entitled to his interest. If either of the survivors should predecease Nathaniel, without issue, the entire interest or estate would, upon the same principle and by the same process, vest in the survivor. It is immaterial whether this deed operates as a covenant to stand seized, being in consideration of natural love and affection, or as a bargain and sale, as seems to be contemplated by the draftsman by the imaginary passing of the pepper corn as a consideration. Under our statute, by which registration is declared to be in lieu of livery of seizin, the deed would operate as a feoffment. *Hogan v. Strayhorn,* 65 N. C., 279; *Rowland v. Rowland,* 93 N. C., 214. If W. G. Gray, Jr., and J. N. B. Gray should both survive Nathaniel Gray, no question can arise as to the effect of their deed to the defendant; or, if either or both should die during the lifetime of Nathaniel, leaving issue, the contingency upon which the limitation would operate could not arise and their estate in fee-simple defeated. In this contingency no question could arise in respect to their deed. If one should die without issue before the death of Nathaniel, his one-third interest would vest in the survivor; his one-half of one-third, vested in him by reason of the death of John W. Gray, would pass under the deed, upon the principle laid down in *Hilliard v. Kearney,* 45 N. C., 221. In this event the deed of the survivor would pass his vested interest, and his "possibility, coupled with an interest," would, upon the principle announced in *Watson v. Smith,* 110 N. C., 6; 28 Am. St. Rep., 665, pass to his grantee or assignee. The

only other contingency which could arise would be the death of the last survivor, during the life of Nathaniel Gray, without issue. We are of the opinion that his interest would become absolute in fee upon the death of the other grantees. In *Rowland v. Rowland, supra,* an estate was given by deed to John B. and Ophelia Rowland, the *habendum* of the deed being "to have and to hold the same to the said John B. and Ophelia Rowland and their heirs as aforesaid as tenants in common, and upon the death of either one, then to the survivor and his or her heirs forever." *Ashe, J.,* concludes an interesting opinion as follows: "Our opinion is that a defeasible fee in common was given to John B. and Ophelia Rowland, and upon the death of Ophelia the absolute fee vested in John, as survivor, because such was the manifest intention of the donor, and because that construction is not in violation of any principle of law or rule of construction." This deed having been executed since the act of 1879, section 1280 of The Code, the use of the word "heirs" after survivor or survivors is not necessary to create an estate in fee-simple in respect to the accrued interest or shares under the limitation in the deed. The deed provides that the land conveyed shall "be held, not subject to the debts of either of the said remaindermen, except as to the surplus of rents as to each share over $500; the object of this deed, in part, being the support and maintenance of the said John W., William G. and J. N. B. Gray, pursuant to section 1335 of The Code of North Carolina; and to that end no trustee is now appointed, to the end that upon the death of the said Nathaniel Gray a trustee, to give bond, may be appointed by the Superior Court." This we construe to be an attempt to create a spendthrift trust, which may be done by conforming to the provisions of section 1335 of The Code: "It shall and may be lawful for any person, by deed or will, to convey any property to any other person in trust to receive and pay the profits

annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant: *Provided,* that this section shall apply only to grants and conveyances where the property conveyed does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars."

What restriction upon alienation may be placed upon the grantees or *cestuis que trust* by this section we do not feel called upon to decide, because, in our opinion, the language of the deed does not conform to the provisions of the statute. There is no such declaration of trust in the deed as the statute requires, nor is there any limitation of the estate to the life of a child or grandchild. The provisions of the statute should be at least substantially met and complied with to create the trust with its incidents contemplated by the statute. A mere declaration that it is the object of this deed, in part, to do so, and failing to appoint a trustee, does not create such a trust as the Court would enforce by the appointment of a trustee. We are of the opinion that the plaintiff's title is not affected by the provisions of this section, and their right of alienation is in no manner affected thereby.

Upon a careful consideration of the deed in question, in the light of the facts set forth in the case agreed, we are of the opinion that his Honor was correct in holding that the defendant acquires a fee-simple title to the lot called the "Moody property," and that the plaintiffs are entitled to a specific performance of the contract.

The judgment of the Court below is

Affirmed.

HAHN v. BRINSON.

(Filed September 22, 1903.)

JUDGMENTS — *Superior Court — Supreme Court — Rules of Supreme Court — Rule 39 — The Code, secs. 416, 417 — Motion Docket — Waiver—Trial.*

The waiver of a jury trial by consent, or that judgment may be entered out of term, must be in writing, filed with the papers in the case, or by oral consent entered on the minute docket of the court.

ACTION by M. Hahn, administrator, against D. H. Brinson and others, heard by Judge *Garland S. Ferguson,* at April Term, 1903, of the Superior Court of PAMLICO County.

From a refusal to set aside a judgment the defendants appealed.

Simmons & Ward, for the plaintiff.
D. L. Ward, for the defendants.

WALKER, J. This is a motion to set aside a judgment. The plaintiff brought the action to recover the possession of a tract of land described in the pleadings. On the first day of December, 1901, the Judge who presided at the Fall Term, 1901, of Pamlico Superior Court rendered a judgment in the case out of term, which was afterwards filed in the Clerk's office and in which is this recital: "A jury trial is waived and, by consent, the Court allowed to find the facts." There was no written waiver of the right to a trial by jury, in person or by attorney, filed with the Clerk, and no oral waiver was entered in the minutes. The defendants, Whaley, Philpot and Brinson, moved in the Court below to set aside the judgment upon the ground, as stated in the affidavits of their counsel filed by them, that they had not consented to waive a

jury trial, nor had they consented that judgment should be rendered out of term. The plaintiff filed an affidavit of his attorney, in which it was alleged that the defendants had agreed to waive a jury trial and had also agreed that the Judge should render the judgment out of term.

It is provided by The Code that a jury trial may be waived by written consent, in person or by attorney, filed with the Clerk, or by oral consent entered in the minutes, and that when a jury trial is thus waived the decision of the Judge shall be filed with the Clerk during the term of the Court at which the trial takes place. The Code, secs. 416 and 417. It has often been held that this Court will not undertake to pass upon conflicting affidavits of parties or counsel in order to determine whether an agreement to waive compliance with the provisions of The Code and the rules of practice has been made, unless the terms of the agreement can be shown without considering the affidavits of the party who alleges that there was such a waiver. *Scroggs v. Alexander,* 88 N. C., 64; Clark's Code (3d Ed.), pp. 725, 932. Not only has it been so decided, but it has been a rule of this Court for many years that no agreement of counsel in any case will be recognized or enforced "unless the same shall appear in the record or in writing filed in the cause." 128 N. C., 645, Rule 39.

The section of The Code in regard to the waiver of a jury trial and the rule of this Court as to agreements by counsel are substantially the same and have received the same construction, and they will always be strictly enforced. This is a Court for the correction of errors and not for the decision of disputed questions of fact arising in the Court below as to agreements of counsel. *Hemphill v. Morrison,* 112 N. C., 756. In the case of *Sondley v. Asheville,* 112 N. C., 694, this Court said: "It is to be hoped that hereafter counsel will in every instance put their agreements in writing or have them entered of record, when for any reason they may think

best to depart from the plain provisions of the statute. If they do not care to do this, the Courts will not pass upon the controversy as to the terms or existence of such agreement." *Graham v. Edwards,* 114 N. C., 228. In this case there is unfortunately a difference in the recollection of counsel as to what was agreed at the trial of the case, and their affidavits, therefore, are conflicting. We cannot consider these affidavits, under the well-settled principle we have just laid down, and as the requirements of The Code and of the rule of this Court have not been complied with, we must hold that there was no agreement to waive a jury trial and consequently no consent to the rendition of judgment out of term, because there is no legal evidence of the same.

The defendants' counsel insisted in this Court that Rule 39 was not applicable to this case, as the agreement was made with the Judge and not between the counsel. We do not agree with counsel as to this; but if he is right, the provision of The Code requiring a writing or an entry in the minutes in order to show a waiver is surely applicable.

The Court below committed no error in refusing to pass upon the affidavits, but there was error in not setting aside the judgment, and for this reason the judgment is reversed. The judgment rendered as of Fall Term, 1901, will be set aside and a new trial awarded.

Judgment reversed.

HART v. CANNON.

(Filed September 22, 1903.)

1. DEEDS—*Fraud—Presumptions—Cancellation of Instruments.*

The bare fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in the deed.

2. DEEDS—*Guardian and Ward—Undue Influence—Fraud.*

It is sufficient to charge, as to undue influence or fraud, that the law scrutinizes transactions between guardian and ward, and that the burden is on the guardian to show that all his transactions with his ward are fair.

3. EXCEPTIONS AND OBJECTIONS—*Instructions—Appeal—Case on Appeal.*

Where there are exceptions to a charge of the trial judge, the case on appeal must state that the instructions excepted to were given.

4. EXCEPTIONS AND OBJECTIONS—*Appeal—Evidence.*

The exception that there is no evidence on an issue must be taken before verdict.

ACTION by L. C. Hart against T. C. Cannon and W. H. White, heard by Judge *G. S. Ferguson* and a jury, at May (special) Term, 1903, of the Superior Court of PITT County. From a judgment for the defendants the plaintiff appealed.

No counsel for the plaintiff.

Skinner & Whedbee and *Flemming & Moore,* for the defendants.

CLARK, C. J. This is an action by a married woman, who sues alone (as the action concerned her separate property, The Code, sec. 178), to recover two town lots in Greenville,

against T. C. Cannon and W. H. White. It was in evidence that Cannon had been guardian of the plaintiff, but that some time prior to 26th January, 1892, she and her husband, both representing that she was twenty-one years of age, went before the Clerk of the Court with Cannon for the purpose of procuring his discharge as guardian, but, it appearing that he had received no money, the Clerk instructed them that no formal discharge was necessary, and that it was sufficient that he should turn over the realty, which he did. There was conflicting evidence on this point.

Subsequently, on 26th January, 1892, the two lots in question were conveyed to Cannon by the plaintiff and husband with her privy examination, and there was evidence that it was for full value and that the deed was delivered to Cannon by the plaintiff's husband. There was further evidence that the plaintiff and her husband had previously, 27th June, 1891, executed a mortgage on other property, which mortgage was later purchased by Cannon. Thereafter, on 8th August, 1893, Cannon conveyed said lots to his co-defendant White, who took for full value and without notice of any claim that the plaintiff was under age, 26th January, 1892. White proceeded to erect a valuable residence thereon.

On 28th November, 1893, the plaintiff and her husband (she being then of full age) executed another deed to Cannon for said lots, her privy examination being taken, but no further consideration being paid.

The plaintiff seeks in this action to recover said two lots, alleging that she was not of age 26th January, 1892, and hence that her deed of that date is void, and "that the execution of the deed, 28th November, 1893, was without consideration and was not signed freely and voluntarily on the part of said plaintiff, but the execution of the same was secured by said defendant Cannon by fraud, threats, intimidation and duress."

There was evidence offered to show that the deed of 28th November, 1893, was executed under duress in that Cannon threatened to prosecute the plaintiff and her husband for falsely representing that she was twenty-one years of age at the time she executed the mortgage to Latham & Skinner, which was executed 27th June, 1891, before the first deed to Cannon, and to give them trouble. There was evidence contradicting this.

Upon issues duly submitted the jury found: That the deed of 28th November, 1893, was not procured by fraud, duress or undue influence by Cannon; that the plaintiff was not of full age at the execution of the deed of 26th January, 1892; that Cannon gave for said property a fair and reasonable value; that the plaintiff by her act and deed ratified and confirmed her deed of 26th January, 1892, after she became twenty-one years of age, and that White was an innocent purchaser without notice of the minority of the plaintiff at the date of her first deed, 26th January, 1892.

There was no exception to the evidence. The plaintiff excepted because the Court refused to give the jury the following instructions prayed for:

(1). "If the jury shall find from the evidence that at the time of the execution of the deed, 28th November, 1893, by plaintiff and her husband to the defendant Cannon, the latter was owner of the note and mortgage executed by the plaintiff and her husband to Latham & Skinner on 27th June, 1891, then there is a presumption of law that the deed from the plaintiff and her husband, 28th November, 1893, is fraudulent, and the burden is on the defendants to satisfy the jury that the plaintiff received full value for her said land, and that no fraud or undue influence was used in securing the execution of said deed."

This was properly refused. The bare fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in the deed.

(2). "If the jury shall find from the evidence that the defendant Cannon was the guardian of the plaintiff, and at the time of the deed of 28th November, 1893, to said Cannon by the plaintiff and her husband, the defendant Cannon had failed and neglected to file a final account and have a settlement with his said ward, then on account of the relation between the parties the law presumed fraud in the execution of said deed and the law imposes the burden on the defendant to rebut the legal presumption of fraud." Instead of said prayer the Court charged the jury: "The law scrutinizes transactions between guardian and ward, and between one who has recently been guardian and his recent ward, and the burden is on defendants to show that all transactions both between the plaintiff and the defendants as mortgagor and mortgagee and guardian and ward were fair, and further, that the facts that Cannon held a mortgage on other lands of the plaintiff and had recently been her guardian were circumstances which they should consider and from which, in connection with the alleged threat to prosecute the plaintiff and her husband, the jury might find fraud and undue influence in answer to that issue." The plaintiff has no cause to complain.

After judgment the plaintiff filed exceptions to the charge reciting certain alleged paragraphs therein, but the "case settled" does not state that the judge charged as recited in the exceptions. The plaintiff had a right within ten days to file exceptions to the charge, "but this Court will not assume that the facts stated in an assignment of error are true when the case on appeal, settled by the trial Judge, contains no statement of such fact." *Merrill v. Whitmire,* 110 N. C., 367; *Luttrell v. Martin,* 112 N. C., 594; *State v. Hart,* 116 N. C.,

976; *Paper Co. v. Chronicle,* 115 N. C., 147; *Patterson v. Mills,* 121 N. C., 259. As the appellant makes out the case on appeal, he should state that the Judge so charged, and if true, the Judge will not strike it out. As the case settled does not state that the Judge charged as recited in these exceptions, the matter is not before us, but we may say, however, we find no error in the paragraphs recited, if the Judge so charged.

The exception that there was no evidence on the third issue ("Was the amount paid by Cannon fair and reasonable?") is one that can only be taken before verdict. *State v. Hart, supra; State v. Kiger,* 115 N. C., 746, and numerous other cases cited in Clark's Code (3d Ed.), p. 773; *State v. Harris,* 120 N. C., 577, and cases there cited. Besides, "an exception for refusal of a prayer to instruct the jury that there is no evidence on an issue will not be considered on appeal, where the case on appeal does not set out the evidence itself or contain a statement that there was no evidence, the presumption being that the trial Judge charged the jury correctly upon the evidence adduced on the trial." *James v. Railroad,* 121 N. C., 530; 46 L. R. A., 306. Even had the objection that there was no evidence been taken before verdict, it does not appear from the record that in fact there was no evidence. We cannot assume that the trial Court erred. The presumption is the other way, and the burden is on the appellant to assign and show error. Besides, the case on appeal sets out affirmative evidence on that issue: that of Cannon, who testified that "he thought it a fair value and that he thought he was given more than the land was worth."

No error.

SMALLWOOD v. LIFE INSURANCE CO. OF VIRGINIA.

(Filed September 22, 1903.)

1. INSURANCE—*Life Insurance—Premiums—Policy—Estoppel.*

Where an insurance company, by inadvertence, sends notice to a policy-holder for a less premium than that due, it is not estopped, upon discovery of the error, from collecting the proper amount.

2. INSURANCE—*Premiums—Fraud—Issues.*

Where a complaint in an action to recover premiums alleges fraudulent misrepresentations as to the earnings of the company and the application thereof, it is proper to submit an issue as to fraud.

3. INSURANCE—*Premiums—Payment of Premiums—Delay.*

Under the facts of this case, the delay in payment of the proper amount of premium is not such as to deprive the policy-holder of the right to pay that amount and have his policy continued.

ACTION by S. W. Smallwood against the Life Insurance Company of Virginia, heard by Judge *G. S. Ferguson* and a jury, at May Term, 1903, of the Superior Court of CRAVEN County. From a verdict for the plaintiff the defendant appealed.

D. L. Ward and *Simmons & Ward,* for the plaintiff.
W. W. Clark, for the defendant.

CLARK, C. J. On 27th December, 1886, the defendant issued to the plaintiff a policy of insurance upon his life in the sum of three thousand dollars, in which it was stipulated that the premium should remain at the rate charged for the then age of the insured for five years, that the policy should then be renewed for another five years, the insured paying the

rate charged "by the published rates of the company" for the age the insured should have attained at the beginning of this second five years, and so on with a similar raise according to the age in said "published rates," at the beginning of each successive period of five years. The premium was payable bi-monthly and it appeared that the insured paid as required "by the published rates of the company," the bi-monthly premium of $6.72 for the first five years, $7.59 for the next five years and $8.76 for the next five years. That at the beginning of the next five years, December, 1901, the rate by said published rates was $10.68. By some clerical error, as the defendant claims, notices for the first three bi-monthly payments were sent out for the premiums and they were collected, at the old rate, $8.76, and the evidence shows that the defendant notified the plaintiff of the mistake and that the payment 27th June, 1902 (next falling due thereafter), must be paid as required by the terms of the policy and "the published rates," $10.68. The plaintiff insisted that the defendant was estopped by having already received three bi-monthly payments on the new five-year period at $8.76 and sent a check for that sum for the payment of the premium due 27th June, 1902, which was returned to him. Considerable correspondence ensued, till finally on 16th September, 1902, the plaintiff notified the defendant that on the advice of the State Insurance Commissioner he would pay the $10.68 premium and sent the company a check for $21.36 for the two premiums then due (for 27th June and 27th August). The company declined to receive this on the ground that his policy having been forfeited by failure to meet those payments, it could only be re-instated by undergoing a new medical examination. This the plaintiff declined, and brings this action to recover all premiums paid, with interest, alleging wrongful cancellation. The plaintiff further alleged fraudulent representations, in that plaintiff was induced to

take the policy by the company's representations that there would be no increase in the premiums because dividends declared by the company would maintain the premium at a uniform rate. In the policy it is stated, "it is estimated that the dividends declared every five years will maintain the premiums at a uniform rate." The plaintiff contends that this provision and the further provision in *a paper* (*Exhibit B*) *sent with* the policy—"no dividends will be declared on this policy except at the end of each five-year period"—taken together with the sending out notices to him of $8.76 premium for the first three payments on the fourth five-year period, to-wit, 27th December, 1901, 27th February and 27th April, 1902, were sufficient, if not an estoppel on the defendant, at least to justify him in questioning *bona fide* the requirement of $10.68 on 27th June, and that having on 16th September, 1902, sent checks for $10.68 for June and August bi-monthly premium, which was not unreasonable delay in investigating his rights, the company should have received the payment. The plaintiff further introduced evidence to show that the company was earning 12½ per cent. net annually, after paying exorbitant salaries, $23,000 to three principal officers of a company with a capital stock of $50,000, and tending to show that if the dividends had been properly declared from earnings, his premium for this five-year period would not exceed $8.76 bi-monthly, which sum he had tendered. The defendant pleaded the statute of limitations.

By consent, issues were agreed to be submitted as to the wrongful cancellation, as to the alleged fraud, and the statute of limitations. The Judge, however, at the close of the evidence refused to submit any issue except the first, and the defendant excepted. The defendant requested the Court to charge the jury "that if the defendant by mistake collected a less premium than the one established by the published rates, it was not compelled nor required in law to continue

to collect this smaller premium, but at the time, upon the discovery of the mistake, it had a right to demand and collect from the plaintiff the premium established by its published rates for the actual age of the plaintiff" (at the beginning of the fourth period of five years). The Court declined to so charge and in effect instructed the jury that the fact that the notice had been sent out for $8.76 for the first bi-monthly premiums at the beginning of that period estopped the company to claim the $10.68 payment at all during that five-year period. The defendant excepted to this refusal to charge as requested.

In these rulings there was error. If the notices were sent out at $8.76 by a clerical error or inadvertence, the company was not estopped to demand the succeeding premiums, after the discovery of the error, at $10.68, if that was the true rate. The plaintiff was entitled on the other hand to have tried and determined his charges of fraudulent misrepresentation and whether, if dividends were properly declared out of earnings and applied to premiums as promised in the policy, the amount legally due would exceed $8.76, the amount tendered. But if the jury shall determine that the dividends, if properly declared and applied, would not reduce the premiums to $8.76, we are further of the opinion that while the sending out notices for three bi-monthly premiums at $8.76, if done by mistake and inadvertence, would not estop the company upon discovery of such mistake from demanding payment of premiums thereafter at the true rate required by the terms of the policy, yet we are further of the opinion, in this Court of Equity as well as of Law, that if the plaintiff was misled by the provision in the policy that at the end of each term of five years dividends would be applied to reduce premiums, and *bona fide* believing that the notices and payment of three premiums was evidence of such application, then his delay till 16th September, occupied in correspond-

ence with the defendant and in asserting his rights, was not unreasonable, and that upon his tender then of the 27th June and 27th August premiums at $10.68, and expression of his willingness to pay at that rate, the company had no right to cancel the policy. Should such state of facts be established in the Court below, judgment should be rendered that if by a day named therein the plaintiff shall tender all bi-monthly premiums from 27th June, 1902, to said date, computed at $10.68, the defendant shall be ordered to re-instate the plaintiff as a policy-holder without further medical examination, and on refusal of the company, within a time specified in the order, to so re-instate the plaintiff, then judgment shall be rendered in favor of the plaintiff to recover all premiums paid, with interest, by reason of the wrongful cancellation of the policy and refusal to re-instate as ordered by the Court. But nothing herein shall be construed to prevent the plaintiff from proceeding in this action, should he so elect, upon the ground of fraudulent representations, and to show, if he can, that dividends had been earned which should have rightfully been declared and applied, and which would have reduced the premium, rightfully due, to $8.76 (the sum tendered 24th June, 1902) or less. For errors stated there must be a

New trial.

BEST v. BRITISH AMERICAN MORTGAGE CO.

(Filed September 22, 1903.)

USURY—*Mortgages—Judgments—Former Adjudication.*

Where an action is brought to restrain a sale under a mortgage on account of alleged usury, and it is removed to the federal court and the amount in controversy is adjudicated, the judgment therein is a bar to a subsequent action by the mortgagor for alleged usury in the mortgage.

ACTION by W. E. Best, administrator, against the British American Mortgage Company, heard by Judge *George H. Brown, Jr.,* at December Term, 1902, of the Superior Court of GREENE County. From a judgment for the defendant the plaintiff appealed.

Geo. M. Lindsay, for the plaintiff.
L. V. Morrill and *Battle & Mordecai,* for the defendant.

MONTGOMERY, J. This action was brought by the plaintiff against the defendant to recover $1,646, double the amount of an alleged usurious charge made and collected by the defendant from the plaintiff's intestate. It was alleged in the complaint that the plaintiff's intestate in 1890 borrowed from the defendant $7,500, and secured the payment of the same and interest by a deed of trust on a tract of land in Greene County, and "that on or about the — day of October, 1897, the defendant took from, received, reserved and charged the said B. J. Best, surviving partner of B. J. & R. E. Best, 10 per cent., calculated on the amount then due on said mortgage, in addition to the principal and interest of said debt due by said mortgage, amounting to $823, which amount was reserved by the terms of said mortgage or trust deed, in addi-

tion to the sum loaned, and interest thereon, and was an usurious charge under the laws of this State, and the taking, receiving, reserving and charging of said sum of 10 per cent. by the defendant from the plaintiff was an usurious transaction, as denounced by the laws of North Carolina, and therefore the defendant is indebted to the plaintiff in the sum of $1,646 for wrongfully taking and receiving from the plaintiff the sum of $823, usurious interest in double said sum, to-wit, sixteen hundred and forty-six dollars."

The defendant in its answer denied the charge of usury and set up as an affirmative defense that the matter out of which arose the plaintiff's allegation of usury was fully tried and determined between the parties to this record in another action theretofore commenced in the Superior Court of Greene County, and afterwards removed to the Circuit Court of the United States at Raleigh; that in that action it was expressly decreed that the defendant recover that sum, $823, of the plaintiffs in that action, B. J. & R. E. Best, and that that sum was collected by a sale of the mortgaged premises under the decree of the said Circuit Court, and that by such matters the plaintiff is estopped.

In 1895 the trustee named in the deed of trust, at the request of the defendant, advertised the property conveyed therein for sale, for the payment of the amount due on the debt. The plaintiffs brought an action in the Superior Court of Greene County to restrain the sale on the ground of usury and to ascertain the true amount of the debt. The restraining order was issued and afterwards the case was removed to the Circuit Court of the United States at Raleigh. In that Court, the plaintiffs, B. J. & R. E. Best, on January 14, 1896, filed their complaint, in which they alleged that the notes executed by them to the defendant, aggregating $9,310.35 and secured by the deed of trust, were executed for money loaned by the defendant to the plaintiffs, and upon

no other consideration; that upon such loan the defendant advanced to the plaintiffs the sum of $7,500 and no more, and that all of the notes in excess of $7,500 were for interest charged by the defendant at a greater rate than 8 per cent. per annum, and was usurious and void. The plaintiffs alleged the payment of several amounts on the indebtedness. There was a further allegation that the defendant, while admitting that the plaintiffs had paid the sum of $2,711.30 on their indebtedness, refused to allow the credits as claimed by the plaintiffs and also to deduct the alleged usurious interest. The complaint was concluded with a prayer "that an account may be stated between them and the defendant and the true indebtedness be ascertained, and that upon payment of the amount due the plaintiffs may be permitted to redeem said land."

The defendant in its answer averred that $7,500 of the notes were executed for the principal of the loan and that the other notes were executed for the interest on the loan, and that no greater rate of interest than 8 per cent. was charged. There is further set out in the answer a statement of the credits to which the plaintiffs were entitled, and an averment of the full amount of the balance due.

The deed of trust contained a provision in these words: "That if it shall become necessary to employ an attorney to foreclose this mortgage or collect any part of the debt herein secured, they will pay the attorney's fees fixed at 10 per cent. of the amount in suit, and all other lawful and proper costs and expenses that may be incurred by the party of the second part in that behalf, and that this mortgage shall stand as security for the same." An opinion was filed on April 1, 1897, by the Honorable Charles H. Simonton, Circuit Judge, in which it was stated that the clause providing for the fees of counsel did not come into operation until there should be a breach of the contract, and that "the presumption is always

that parties will observe and keep their contracts; at all events, this result is not certain; it is contingent." It is further said in that opinion: "The contract being otherwise *bona fide* and not usurious, this uncertain provision should not change its character. *Whitewater Co. v. Vallet*, 21 How., 422. In *Spain v. Brent*, 1 Wall., 626, the Court says: 'The payment of anything additional depends also on a contingency and not upon any happening of a certain event which, itself, would be deemed insufficient to make a loan usurious.' This question was made in an exception to the Circuit decree in *Whaley v. Am. Freehold, etc., Co.*, 74 Fed. Rep., 73, *supra*, and in the concluding part of the decision of the Court, was sustained in general words. A provision like this is in the nature of a penalty and is enforced as such. As the Court has taken this matter within its jurisdiction, it can determine to what extent the penalty can be enforced. The attorney's charges will be allowed, but no further commissions to the trustee. All actual expenses which he may have incurred are allowed him. The conclusion of the whole matter is that this contract is not usurious. Let the Clerk of the Court, with the attendance and aid of the counsel for the parties in the cause, compute the amount now due according to the tenor and effect of the contract, and add thereto the 10 per cent. for attorney's fee, and such sum as for actual expenses which the trustee may have incurred in executing his trust, and then let a decree be prepared carrying out the principles of this opinion."

Upon the report of the Clerk at the February Special Term, 1897, a decree in conformity to the opinion was made and entered. In the decree it was provided that if the recovery and costs should not be paid within sixty days from the first day of April, 1897, then the land should be sold for cash by the commissioner appointed for that purpose. Default was made in the payment of the amount, and the sale was made and reported to the Court and confirmed in all respects.

On the trial of this case in the Court below, his Honor Judge Brown held that the cause of action set out in the complaint had been adjudicated by the Circuit Court of the United States in the cause entitled B. J. Best and others against the defendant, and that the plaintiff was not entitled to recover. We see no error in that ruling, nor any error in the judgment which followed.

It was contended by the plaintiff's counsel that whether the charge of the attorney's fees of $823 was usurious or not was not in issue in the case, as it was constituted in the Circuit Court of the United States; that the only usury charged in the complaint was that in the rate and amount of interest charged upon the sum actually loaned; and the case of *Tyler v. Capehart,* 125 N. C., 64, was insisted upon as an authority. We do not see the application. There, the cause of action was of a different nature from that on which the first suit was brought, and the two were not necessarily connected. In the case before us, the sale by the trustee had been enjoined on the ground of usury—usury, it is true, in the matter of the interest charged—but in the complaint there was a prayer that an account might be stated between the parties, and that the true indebtedness might be ascertained to the end that upon the payment of the amount found due the land might be redeemed. That prayer opened up every question that might be involved in the ascertainment of the true indebtedness, including any species of usury that might be charged or proved in the matter. The opinion of the Circuit Court covered the prayer of the plaintiff and discussed the matter of counsel fees, and the decree embraced it. There was no appeal from that decree, and the matter is *res judicata.*

No error.

CALVERT v. CARSTARPHEN.

(Filed September 22, 1903.)

APPEAL—*Brief — Printing Brief — Rules of Supreme Court — Rules 32, 34.*

An appeal will be dismissed for failure of appellant to file printed brief on Tuesday of the week preceding the call of the district to which the cause belongs, unless, for good cause shown, the court shall give further time to print the brief.

DOUGLAS, J., dissenting.

CLARK, C. J. The transcript on appeal was docketed 29th August. The appeal coming from the Second District, the call of which began 8th September, the appellant should have filed his printed brief by 10 A. M. 1st September (Rule 34, 131 N. C., 831), under the penalty therein prescribed, that on failure to do so, "the appeal will be dismissed, on motion of appelle, when the call of that district is begun, unless, for good cause shown, the Court shall give further time to print brief." The motion to dismiss was made by appellee at the beginning of the call of the Second District, 8th September, and no printed brief for appellant being on file and no cause for further time being shown, the appeal was dismissed. On 10th September the appellant moved to re-instate the appeal.

The appellant bases his motion on the ground that there was not sufficient time to print the brief between the filing of the record on Saturday, 29th August, and 10 A. M. Tuesday, 1st September, the date specified in the rule. It is by no means clear that a brief could not be printed in one or two days. Besides, as Rule 32 suggests (131 N. C., 831), the brief might be printed below and sent up with the transcript, for the appellant should certainly know the grounds of his own exceptions, and when the record is printed late,

as in this case, the reference in the brief to the paging of the printed record could be left blank and filled in with a pen before the call of the district to which the appeal belongs.

Then, too, if the appellant had cause he should have moved the Court on 1st September or some day during that week for longer time in which to print a brief. Certainly when the motion to dismiss for want of a printed brief was made at the beginning of the call of the district, 8th September, he should then have had his printed brief ready, and have shown cause why he should be allowed to file it, and have negatived laches. *Pipkin v. Green,* 112 N. C., 355. "A motion to re-instate will not be allowed on an excuse which should have been set up in answer to the motion to dismiss. *Paine v. Cureton,* 114 N. C., 606; *Johnston v. Whitehead,* 109 N. C., 207.

It has been repeatedly held that when an appeal has been dismissed for failure to print the record, a motion to re-instate will not be allowed on the ground that the failure to print was the neglect of counsel. *Neal v. Land Co.,* 112 N. C., 841; *Dunn v. Underwood,* 116 N. C., 525; *Wiley v. Mining Co.,* 117 N. C., 490, and there are other cases, all to the same purport. Printing the brief, like printing the record, is the duty of the client, and as to that matter, his counsel, if charged with that duty, is merely his agent in fact, and the neglect of such agent is the neglect of the client. *Edwards v. Henderson,* 109 N. C., 83; *Griffin v. Nelson,* 106 N. C., 235. It is true, counsel must prepare the brief, and so they must also attend to settling the "case on appeal," and the trial below, but if they neglect those duties the client bears the penalty (and not the opposite party) and must look for compensation to his counsel. The dismissal is for failure to print the brief (or the record, as the case may be) and not for failure to prepare them. All courts which require printed briefs and printed records strictly enforce the rule, otherwise

discussions over motions to dismiss and to re-instate might prove more vexatious than printed briefs and records would be beneficial to the Court. We refer, without repeating, to what is said in *Edward v. Henderson,* 109 N. C., 83, and numerous cases there cited. Should there be causes for extension of time, a motion to that end should be made in apt time.

The rules of this Court are mandatory, not directory. *Walker v. Scott,* 102 N. C., 487; *Wiseman v. Commissioners,* 104 N. C., 330; *Edwards v. Henderson,* 109 N. C., 83. As the Constitution, Article I, section 8, provides that "The legislative, executive and *Supreme Judicial Powers* of the government ought to be forever separate and distinct from one another," the General Assembly can enact no rules of practice and procedure for this Court, which are prescribed solely by our Rules of Court. *Herndon v. Ins. Co.,* 111 N. C., 384; 18 L. R. A., 547; *Horton v. Green,* 104 N. C., 400; *Rencher v. Anderson,* 93 N. C., 105. The practice and procedure in the Courts below the Supreme Court are prescribed by the Legislature, as authorized by the Constitution, Art. IV, sec. 12 (*State v. Edwards,* 110 N. C., 511), except that as to such lower Courts, when the Legislature fails to provide the practice and procedure in any particular, this Court can do so. The Code, sec. 961; *Barnes v. Easton,* 98 N. C., 116; *Cheek v. Watson,* 90 N. C., 302.

In England, when Parliament abolished the forms of action and the entire former system of pleading, practice and procedure, it did not itself enact a Code of Procedure and Practice, but empowered the Judges of the higher Courts to do this for all the Courts. Consequently, the entire practice and procedure, civil and criminal (including all forms), in the mother country, are formulated in "Rules of Practice" prescribed by the Judges, and England has the simplest and most advanced system of practice of all English-speaking

countries. In this State, the Rules of Court are the sole Code of Practice for this Court, and are to be observed as strictly as the legislative provisions as to practice in the lower Courts.

The requirements as to printed briefs and records and the times at which they must be filed are the results of long experience and demanded by the necessity of keeping pace with the increasing volume of business. The rules of this Court are to be observed, like the statutory enactments for practice in the lower Courts, until changed.

The appellant not having filed a printed brief at the time required, nor asked in apt time for further time "upon good cause shown," nor negative laches, the motion to re-instate the appeal is denied.

Motion denied.

DOUGLAS, J., dissents.

CLARK v. CLARK.

(Filed September 22, 1903.)

1. DIVORCE—*Alimony—Complaint—Affidavit—The Code, secs. 1287, 1292.*

   In an application for alimony *pendente lite* the affidavit and petition must be verified as required by section 1287 of The Code.

2. DIVORCE—*Alimony—The Code, sec. 1287.*

   In an action for divorce from bed and board, the affidavit required by section 1287 of The Code must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts therein stated.

ACTION by Cora Clark against Ruffin Clark, heard by Judge *Fred. Moore,* at April Term, 1903, of the Superior

Court of BERTIE County. From a judgment for the plaintiff the defendant appealed.

No counsel for the plaintiff.
Francis D. Winston, for the defendant.

WALKER, J. This is an application for alimony *pendente lite.* On the 4th day of February, 1903, the plaintiff filed an affidavit in the office of the Clerk of the Superior Court, under section 1287 of The Code, in which she stated that she intended to bring an action for divorce against her husband, the defendant, and that she had not had knowledge of the facts upon which her action would be based for six months. It is provided by section 1287 of The Code that when such an affidavit is filed, the wife may reside separate and apart from her husband and secure for her own use the wages of her labor during the time of the separation. On the same day, February 4, 1903, she commenced an action against the defendant for divorce from bed and board by causing a summons to be issued, which was served upon him February 5, 1903. On February 14, 1903, plaintiff filed an affidavit, and, on the 19th day of the same month, a petition, in which she seeks alimony, alleging that she had been neglected and ill-treated by her husband. In the view we take of the case, it is not necessary to set forth her allegations more particularly. The affidavit and petition were not verified as required by section 1287 of The Code. The Court, at the hearing, granted the prayer of the affidavit and petition for alimony and ordered that the defendant should pay to plaintiff five dollars on the first day of each month during the pendency of the action. The defendant was not present when this order was made, though notice of the application had been served upon him. Afterwards his counsel moved to vacate the order of the Court, and this motion being refused the defendant

appealed. In this Court he has also moved to dismiss the action upon the ground that the Court below had no jurisdiction of it.

It appears from the foregoing statement of the facts that the plaintiff brought her action for divorce within six months after she first acquired knowledge of the facts upon which it was based. This is fatal to the plaintiff's case. It is provided by The Code, section 1287, that, in an action for "divorce or alimony or both," the plaintiff shall file with his or her complaint an affidavit setting forth the facts enumerated in that section, and we have repeatedly decided that a failure to comply with this provision of the law will prevent the Court from acquiring jurisdiction of the action. The requirement of the statute is not merely directory nor one that may be waived, but a strict observance of it is essential to confer jurisdiction upon the Court, so that it may take cognizance of the particular action. *Nichols v. Nichols,* 128 N. C., 108; *Hopkins v. Hopkins,* 132 N. C., 22. The plaintiff has not only failed to comply with this provision of section 1287, but it appears affirmatively in the record, as we have already stated, that she brought her action before the expiration of the six months from the time she first acquired knowledge of the facts, which cannot be done. The Code, section 1287. No complaint for divorce has been filed. (*Moore v. Moore,* 130 N. C., 334). There are other defects in the case not necessary to be discussed. As the Court had no jurisdiction of the action, it follows that it had no power to make the order for alimony.

The order of the Court cannot be sustained under section 1292 of The Code, as the proceeding was not instituted under that section and the averments necessary to entitle the plaintiff to relief under it are not made in this case. The plaintiff manifestly did not intend to proceed under that section, as, in her affidavit, filed February 4, 1903, she states that she

intends to bring an action for divorce, and, in the petition, she prays for alimony *pendente lite*, and not for an allowance from the estate of her husband. The Court, in its order, also provided for the payment of alimony during the pendency of the action and not for an allowance out of the estate of the husband. The one is a personal obligation of the husband, the other merely a charge upon his estate or the allotment to her of a part thereof. *Skittletharpe v. Skittletharpe*, 130 N. C., 72. It may be that plaintiff has a meritorious cause of action and that she may obtain relief by a decree for divorce or by an allowance under section 1292 of The Code, in an action or proceeding properly instituted for the purpose, but we are unable to afford her any relief in this case. The order of the Court below must be vacated and the action dismissed.

Action dismissed.

BAKER v. ROANOKE AND TAR RIVER RAILROAD CO.

(Filed September 22, 1903.)

NEGLIGENCE—*Presumptions—Injury to Stock—Nonsuit—Evidence—The Code, sec. 2326.*

Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so.

ACTION by G. W. Baker and W. R. Brown against the Roanoke and Tar River Railroad Company, heard by Judge *Fred. Moore* and a jury, at April Term, 1903, of the Superior Court of BERTIE County. From a judgment for the plaintiff the defendant appealed.

St. Leon Scull and *B. B. Winborne,* for the plaintiff.

Day & Bell, J. B. Martin and *F. D. Winston,* for the defendant.

CLARK, C. J. This was an action for negligently killing a horse. At the close of the evidence the defendant moved to non-suit the plaintiff. The action was brought within six months, and the killing having been shown, the statute raised a presumption of negligence, and the burden to rebut such presumption being upon the defendant, the Judge could not find affirmatively that the defendant's evidence had been sufficient to do this. That was a matter for the jury.

The Judge could instruct the jury as he did in this case that a certain state of facts, if believed by them, would rebut the presumption, but not that certain evidence, though uncontradicted, would do so. The burden is on the defendant to rebut the presumption, and the jury alone can pass on its credibility, otherwise if the only eye-witness is witness for the defendant, the plaintiff would be at his mercy, and would be deprived altogether of the benefit of the statute, because he did not happen to see the killing. It would be a novelty to non-suit the plaintiff on the defendant's evidence.

The Statute, The Code, sec. 2326, originally enacted in 1856, is clear and unambiguous: "When any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be *prima facie* evidence of negligence on the part of the company in any action for damages against such company," with a proviso that the plaintiff cannot have "the benefit of this section" unless the action is brought within six months.

The defendant relies upon an expression in the opinion in *Doggett v. Railroad,* 81 N. C., 467, "that when all the facts and circumstances of the accident are known, the law itself will raise or refuse the inference of neglect, upon which the

liability of the company depends. The force of the presumption only applies when the facts are not known, or when from the testimony they are uncertain." In the present case, this dictum, if it bore the meaning the defendant attributes to it, would not apply, because the facts are disputed. The defendant was not content with the plaintiff's evidence, but put in testimony of its own to show a different state of facts, of course—otherwise it would have been useless.

Furthermore, this expression in the Doggett case has been recently and authoritatively construed and explained (or overruled, as it may be considered) in *Hardison v. Railroad*, 120 N. C., 492, in which *Furches, J.*, speaking for a unanimous Court says: "It seems to us that the language used by the Court in *Doggett v. Railroad*, 81 N. C., 459, and in *Durham v. Railroad*, 82 N. C., 352, is calculated to produce an erroneous impression, and that it would have been more accurate to have said that the *prima facie* case created by the statute is *rebutted* where the undisputed facts show there was no negligence on the part of defendant, than it was to say that the statute *did not apply*. There is no exception in the statute. It is in terms general, and applies alike to all cases of killing stock by a railroad. But this *prima facie* case may be rebutted, and that is what we suppose the Court meant in the cases of Doggett and Durham, *supra*." Accordingly, in Hardison's case, 120 N. C., 492, which reviewed and construed Doggett's and Durham's, the Court held: "Where, in the trial of an action against a railroad company for killing stock, the plaintiff showed the killing and that the action was commenced within six months thereafter and the defendant introduced evidence tending to show that it was not negligence, it was error to direct a verdict for the defendant." The Court held that by the terms of the statute, when as in Hardison's case the killing and the beginning of the action within six months were shown, nothing else ap-

pearing, it was the duty of the Judge to instruct the jury (if they believed the evidence) "to find the first issue for the plaintiff, but as the defendant introduced evidence tending to show that there was no negligence on the part of the defendant in killing the cow—that is, to rebut the *prima facie* case of the plaintiff—it then became an issue of fact which could not be found by the Court, but should have been left to the jury."

Hardison's case is approved by a unanimous Court, the above paragraph being quoted *verbatim* and approved in *Hunter v. Tel. Co.,* 130 N. C., top of page 609. To same purport are all the older cases, *Pippin v. Railroad,* 75 N. C., 54; *Battle v. Railroad,* 66 N. C., 343, and *Clark v. Railroad,* 60 N. C., 109, in which last, the first case after the statute, *Battle, J.,* says the defendant is "put by the law under the heavy burden of proving, affirmatively, a negative."

In fact, the statute is too explicit to admit of more than one construction, and has been adopted in many other States. 2 S. & R. on Neg., sec. 432. In this very case the defendant itself requested and the Court charged: "If the defendant's engineer and firemen were keeping a proper lookout, and the horse suddenly ran to the train, and the fireman looked and saw him and at once notified the engineer, and before the engineer had time to apply the brakes, and the train was properly equipped, the horse was stricken, and the engineer could not have prevented it under all the circumstances, then the defendant has *rebutted the statutory presumption of defendant's negligence,* and in the absence of other negligence on the part of the defendant the jury should find the issue as to negligence 'No.'"

There was evidence that the horse ran along the track 120 to 165 feet before he was struck, and other evidence by reason of which the jury did not find that the presumption of negligence was rebutted.

There are other exceptions, but they are without merit and require no discussion. It was agreed that if the plaintiff could recover, the measure of damages was $55. We find

No error.

SALLINGER v. PERRY.

(Filed September 22, 1903.)

1. NEGOTIABLE INSTRUMENTS—*Mistake—Presumptions—Evidence.*

It is not error to refuse to charge that the presumption of law that notes were the property of the payee could not be rebutted by the unsupported evidence of the payee that they were executed to him by mistake.

2. NEGOTIABLE INSTRUMENTS—*Mistake—Evidence.*

It is not error to refuse to charge that where it is sought to show by parol evidence that notes were executed to the payee by mistake, that the evidence should be received with great caution and the jury should look anxiously for some corroboratory facts and circumstances in support of it, and that the claimant of the note should not delay in the ascertainment of his rights, as a stale claim would merit but little attention.

3. NEGOTIABLE INSTRUMENTS—*Mistake.*

It is sufficient, on the question of mistake as to the payee in a note, to charge that if the jury are thoroughly satisfied from the evidence that the draftsman of the notes made a mistake in drawing them, and that it was intended that they should be made payable to the claimant and not to the payee in the notes, then they should find accordingly.

ACTION by K. Sallinger and others against J. W. Perry & Company, heard by Judge *Frederick Moore* and a jury, at April Term, 1903, of the Superior Court of BERTIE County.

In April, 1893, Mrs. Bettie Sallinger, who was the wife of the plaintiff, K. Sallinger, was engaged in mercantile busi-

ness in Bertie County, under the name and style of B. Sallinger & Co. At that time she was indebted to the defendant, J. W. Perry, who was then trading under the firm name of J. W. Perry & Co., in the city of Norfolk, in the sum of $1,000, and for the payment of which indebtedness she, with her husband, the plaintiff, K. Sallinger, executed and delivered to J. W. Perry & Co. their note, securing the same by a deed of trust made to another of the defendants, George B. Henneberry, upon two tracts of land in Bertie County, belonging to Mrs. Sallinger. At the same time, or shortly thereafter, the plaintiff, K. Sallinger, put into the hands of Perry & Co. nine notes executed by J. B. Willoughby to K. Sallinger, aggregating in amount $832. It was admitted by the defendants that the Willoughby notes were placed by Sallinger with Perry & Co. as a collateral and additional security for the $1,000 note, and the defendants, in the second section of their answer, say "that the first two of said notes (Willoughby) which fell due were sent to K. Sallinger by J. W. Perry, at his request, for collection, and said Sallinger collected said notes, but has never paid over to said J. W. Perry, or to any one for him, any of the proceeds thereof." K. Sallinger alleged in his complaint and testified upon his examination that the Willoughby notes, though made payable to himself, were made so by mistake, and that they should have been made payable to his wife, B. Sallinger; that the consideration was the purchase money of a tract of land belonging to her.

The defendants admitted in their answer that $693.82 had been paid on the $1,000. There is an amount of $211.36 which the plaintiffs contend should be applied as a credit on the $1,000 note, but which the defendants contend should be applied towards the payment of a debt due by K. Sallinger to the J. W. Perry Company, a corporation formed in September, 1893, upon the discontinuance of the firm of J. W.

Perry & Co. That amount was derived from the proceeds of the sales of a lot of peanuts shipped by K. Sallinger to the J. W. Perry Company in February, 1897, and which was applied by the consignees to their debt against the consignor. Sallinger in his complaint alleged, and as a witness testified, that he accompanied the shipment of peanuts with written instructions to the consignees to apply the proceeds of sale thereof to the payment of the $1,000 debt due by himself and wife to the firm of J. W. Perry & Co. That was denied by the defendant. In 1900 the J. W. Perry Company, of which concern J. W. Perry was a large stockholder and president and chief manager, attached in Norfolk the seven remaining Willoughby notes, which were in the hands of J. W. Perry, for the purpose of having them condemned and sold for the payment of the debt due by K. Sallinger to the J. W. Perry Company, and in these proceedings the notes were sold as the property of K. Sallinger and the proceeds applied to that debt.

Mrs. Sallinger has died intestate and left several infant children, her heirs-at-law, who have been made parties defendant, and she left no other real estate than that conveyed in the deed of trust to Henneberry. The trustee had advertised the land for sale to pay the balance claimed to be due on the $1,000 note, and the sale was enjoined until the final hearing of the case. On the trial there was a judgment for the plaintiffs, and the defendants appealed.

Francis D. Winston, for the plaintiffs.

J. B. Martin, Day & Bell and *Winborne & Lawrence*, for the defendants.

MONTGOMERY, J., after stating the facts. The main question presented by the appeal is that concerning the ownership of the Willoughby notes. The plaintiff, W. H. Sallinger,

administrator of B. Sallinger, contends that upon the payment of the balance due upon the note of $1,000 executed by his intestate and the other plaintiff, K. Sallinger, to J. W. Perry & Co., the Willoughby notes belonged to him as administrator of B. Sallinger. There was evidence, uncontradicted, to the effect that B. Sallinger, at the time of her death and at the time of the trial, was indebted to other persons than J. W. Perry & Co.

The plaintiffs introduced evidence tending to show that J. C. Willoughby bought a tract of land belonging to the plaintiff's intestate, and, by mistake of the draftsman, executed his nine promissory notes, each in the sum of $92.45, to K. Sallinger instead of to B. Sallinger, the owner of the land; that upon discovering the mistake, K. Sallinger endorsed the notes in blank and put them in the safe of B. Sallinger & Co. The jury found upon the issue (No. 5), "To whom did the Willoughby notes belong at the time they were assigned to J. W. Perry & Co.?" that the notes belonged to B. Sallinger.

On the fifth issue the defendant Perry, through his counsel, requested several special prayers for instructions, the purpose of one of which was that the law required that the jury must be satisfied and convinced by the evidence that the Willoughby notes were made payable to K. Sallinger by the mutual mistake of himself and his wife; otherwise they should answer the issue, "K. Sallinger"; another, that the presumption of law that the notes were the property of the payee could not be rebutted by the unsupported evidence of K. Sallinger that they were executed to him by mistake, and that the issue should be answered "K. Sallinger"; another, "that when the plaintiff seeks to have the J. E. Willoughby notes and mortgage in question reformed, or a trust declared, for mistake in the draftsman for the same evidence to establish such equity or right, being merely parol, it should be received by the jury

with great caution, and the jury should look anxiously for some corroborating facts and circumstances in support of it; and in a case of this nature the claimant in opposition to the legal title should not delay the ascertainment of his right, as a stale claim would merit but little attention, and unless you are convinced by clear and convincing proof of such right, you should answer the issue 'K. Sallinger.'" His Honor refused these instructions, but charged the jury: "That the burden of proof on the fifth issue is on the plaintiff. The quantum of proof required is different from that required on the fourth issue. Before you can answer the fifth issue 'Yes,' the plaintiff must establish the affirmative of the issue by evidence that is clear, strong and convincing. In this case there is no evidence that Bettie Sallinger, if she was the owner of the Willoughby notes, ever parted with her interest in these notes before they were transferred to Perry, except that they were made payable to K. Sallinger."

The Court also charged on this issue: "If you are thoroughly satisfied from the evidence that the draftsman of the Willoughby notes made a mistake in drawing them—that is, that it was intended that said notes should be made payable to Bettie Sallinger, but that by the mistake of the draftsman they were made payable to K. Sallinger—you should answer the fifth issue 'B. Sallinger,' but otherwise you should answer it 'K. Sallinger.'"

We see no error in the refusal of his Honor to grant the prayers of the defendant Perry, or in the instructions which he gave on the fifth issue. It would have been better if his Honor had said to the jury that before they could answer the fifth issue "B. Sallinger" the plaintiff must establish, by evidence clear, strong and convincing, that the notes were hers at the time they were assigned to J. W. Perry & Co. But there is no doubt that the jury understood his meaning, and the defendant has not been prejudiced.

The Willoughby notes, then, having been found to be the property of B. Sallinger, the sale of seven of them under the attachment proceedings in Norfolk, Va., as the property of K. Sallinger was void, and they belong, therefore, to W. H. Sallinger, the plaintiff administrator of B. Sallinger, to be used in the due course of administration of her estate.

From our view of the case, it is unnecessary to discuss the questions raised on the appeal in connection with the shipment of the peanuts by Sallinger to the J. W. Perry Company and the application of the proceeds of their sale by said company. The jury found that the peanuts were received by K. Sallinger from Willoughby as a payment on his notes. That being so, by operation of law the value of the peanuts, $211.36, whatever became of them afterwards, was a credit upon the $1,000 note, for by the evidence of both K. Sallinger and Perry, Sallinger was the agent of Perry to collect the two Willoughby notes which first fell due; and, also, in the answer of Perry, he admits that he sent the two notes to Sallinger to collect from Willoughby. If, however, it be true, as Perry averred in his answer, that Sallinger collected, in money, the two Willoughby notes and failed to pay the proceeds over to him, he (Perry) is, in law, in no better position than if Sallinger had received the peanuts from Willoughby in payment of the two notes, as the jury have found. He (Sallinger) would have been an unfaithful agent, for whose act the principal (Perry) was responsible. A payment in money to Sallinger by Willoughby would have been a payment to J. W. Perry, and that payment belonged, by force of law, upon the $1,000 note.

We have examined carefully the other exceptions on matters of evidence, and we see no merit in them.

The judgment of the Court below is

Affirmed.

WALKER, J., concurring. I fully concur in the disposition of this case, but I cannot yield my assent to the principle stated in the opinion of the Court, that it requires clear, strong and convincing proof to establish Mrs. Sallinger's ownership of the Willoughby notes. No greater quantity of proof is required in this case than would be necessary to establish her ownership of any other kind of property, where that ownership is disputed. The mere fact that the notes were payable to K. Sallinger, her husband, does not, in my opinion, make any difference or call for a greater degree of proof to establish her right and title to the notes. Besides, it appears that K. Sallinger admits that the notes were given for the purchase money of his wife's land which was sold to Willoughby, and that his wife is the real owner of the notes; and it further appears that K. Sallinger had endorsed the notes to his wife, which transferred the legal title to her, if such a transfer is necessary to complete her title or ownership. It seems to me that the charge of the Court was more favorable to the defendants than they had a right to expect.

CONNOR, J., concurs in the concurring opinion.

DOUGLAS, J., concurring. I concur in the concurring opinion of Justice WALKER, for the reasons stated in my dissenting opinion, when the case was here before, in 130 N. C., 134, 139.

PASTERFIELD v. SAWYER.

(Filed September 22, 1903.)

1. CLAIM AND DELIVERY—*Replevin—Deeds—Escrow—Justices of the Peace—Jurisdiction.*

In this action of claim and delivery for a deed there is no evidence that the title to land is involved, and the jurisdiction of the justice of the peace is not ousted.

2. JUSTICES OF THE PEACE—*Jurisdiction—Claim and Delivery—Pleadings.*

Where a complaint in claim and delivery before a justice of the peace alleges the value of the property to be less than fifty dollars, and the answer does not deny the allegation, no proof of the value is necessary.

ACTION by J. H. Pasterfield and wife against J. H. Sawyer, heard by Judge *M. H. Justice* and a jury, at May Term, 1903, of the Superior Court of PASQUOTANK County. From a judgment for the defendant the plaintiff appealed.

E. F. Aydlett, for the plaintiff.
George W. Ward, for the defendant.

MONTGOMERY, J. This case was before us at the last term and is reported in 132 N. C., 258. The error pointed out at that time was that the Court below dismissed the plaintiff's action for want of jurisdiction. The action was begun in the court of a justice of the peace for the recovery of a deed for real estate. It was brought by appeal of the defendant to the Superior Court, and in that Court, upon its appearing by an averment in the answer of the defendant that the title to real estate was in controversy, his Honor dismissed the action without hearing evidence as to whether the title to real estate was really involved. In the former decision that was the error pointed out.

At the present hearing on the case it appears that his Honor heard evidence on the question whether or not the title to real estate was involved, and, at its conclusion, held that the title to land was in dispute, and dismissed the action because the justice of the peace before whom it was commenced did not have jurisdiction. We think there was error.

Upon a careful inspection of the whole of the evidence, we are of the opinion that an issue should have been submitted to the jury as to whether the deed was deposited with the defendant upon bailment *(depositum)*. The evidence of Pasterfield was to the effect that the deed was put into the defendant's hands after it had been delivered to him for his wife, to be kept by Sawyer until he called for it, free from any conditions.

Sawyer's evidence, it is true, tends to show that during the interview between Buffkin, the grantor, Pasterfield, as agent of his wife, and himself, that Pasterfield was to pay certain amounts, aggregating $156.70, to Buffkin, and that Pasterfield said the money was due to him for work and that he would collect it soon and pay it. But Sawyer did not testify that the payment of the $156.70 was to be made a condition precedent to the delivery of the deed. The witness further said that when Pasterfield and Buffkin started out of the room, leaving the deed and mortgage, that he said: "Gentlemen, the law requires the note and deed to be stamped, and I would like to have my fee," and that Buffkin said: "Put the deed and mortgage in your safe and we will be in in a few days and pay your fee and give you the money to buy the stamps to put on the deed and note and have the paper recorded." But there is nothing in that testimony contradictory of that of Pasterfield in connection with the delivery of the deed, and nothing tending to show that Sawyer's purpose was to inform either of the parties that they could not get the deed and mortgage upon application. The language and the

action of the parties afford no evidence that Sawyer intended to hold the deed and mortgage as bailee until his fee should be paid. At most, it was but a request on his part for his fee.

As we have intimated, when we suggested a proper issue which should have been submitted in the case, there was no evidence that the deed was held as an escrow.

It is also true that Sawyer testified that Buffkin said to him: "If Pasterfield comes and pays the $156.70 in a few days, you can take out my part for stamps and fee out of it and give him the deed and have the paper recorded, and see that the mortgage goes on immediately after the deed, and don't give him the deed until he pays." The deed, as we have seen, having been delivered by the grantor to Mrs. Pasterfield, could not afterwards be turned into an escrow by any subsequent conversation to that effect by the grantor and Sawyer. Sawyer also testified that Pasterfield did not have the deed in his hands; but Sawyer's evidence was that the deed and mortgage had been prepared by himself, had been executed by all the parties, were lying on his table while the interview was going on, with nothing to be done on either side in connection with the delivery of the deed, and it was immaterial whether or not Pasterfield actually had his hands on the deed when the conversation took place about his keeping the deeds for the parties. Sawyer also testified that, after Buffkin's death, Pasterfield called at his office and was told by him to see the administrator of Buffkin and "fix the matter up," as he wanted to get rid of the papers, and that Pasterfield said he would do this.

There was no evidence tending to show an escrow. It referred to nothing in particular. What was "to be fixed up" did not appear.

There was no evidence on the trial that the deed was worth less than fifty dollars, and it might have been contended in the Court below that on that account the magistrate did not

have jurisdiction; that as courts of justices of the peace are courts of limited jurisdiction, having no power to hear and determine actions brought for the recovery of personal property of greater value than fifty dollars, it was necessary for the plaintiff to have affirmatively shown by evidence that the deed was worth not more than fifty dollars. But it was alleged in the complaint that the deed was worth from fifteen to twenty-five dollars, and the answer simply denied the allegation. It is clear that the answer did not raise any issue on the value of the deed, but was in fact an admission that it was not worth as much as fifteen or twenty dollars.

New trial.

NEWBERRY v. NORFOLK AND SOUTHERN RAILROAD CO.

(Filed September 22, 1903.)

1. EVIDENCE—*Claim and Delivery.*

Where goods are shipped to A. Alexander, and there are two persons of that name, it is competent to show by the shipper for whom they were intended.

2. DECLARATIONS—*Evidence—Claim and Delivery.*

Where one person claims goods by purchase of another, the declarations of the seller as to ownership of the same, he having never been in possession thereof, are not competent.

3. INSTRUCTIONS—*Charge—Fraud—Trial—Issues.*

Where there is evidence of fraud, it is not error for the trial judge to instruct that there was evidence of fraud, though there was no issue as to fraud.

ACTION by D. O. Newberry against the Norfolk & Southern Railroad and others, heard by Judge *M. H. Justice* and a

jury, at April Term, 1903, of the Superior Court of TYRRELL County. From a judgment for the defendant the plaintiff appealed.

This was an action brought by plaintiff against defendant company for the recovery of fifty boxes of Fairbanks Gold Dust Washing Powder, alleged to be the property of plaintiff and in the possession of and detained by the defendant. At Spring Term, 1901, of the Superior Court of Tyrrell County, the N. K. Fairbanks Company was allowed to become party defendant, to which the plaintiff excepted. The defendants thereupon answered the complaint, denying the allegation in respect to the ownership of the property and the wrongful detention, and for a further answer alleged "that said property was never shipped to nor intended for Arthur Alexander, under whom the plaintiff is pretending to claim it, but it was intended by the shippers for Alfred Alexander; that even if it had been intended for Arthur Alexander, the defendants had the right to refuse to deliver it, for the reason that Arthur Alexander did not intend to pay for goods shipped to him, and was absolutely insolvent, which facts the plaintiff did know or could have known by reasonable inquiry; and the defendants further deny that plaintiff is a purchaser for value and without notice, even if said goods had been shipped to Arthur Alexander. They also say that Arthur Alexander never had any interest in said goods."

The case was tried upon the following issue: "Is the plaintiff the owner of the property described in the complaint?" To which the jury responded "No."

The plaintiff showed by the agent of defendant railroad company that the goods were received at the depot at Spruill's Bridge, billed to A. Alexander; that Arthur Alexander lived in Tyrrell County, about three miles from the depot; that Alfred Alexander lived at Creswell, Washington County,

about three-fourths of a mile from the depot. The plaintiff proposed to ask witness: "Which A. Alexander claimed the property in controversy?" Defendant objected, the objection was sustained and the plaintiff excepted.

The plaintiff introduced "Exhibit A": "Received of D. O. Newberry, one dollar and other valuable considerations for fifty cases Fairbanks' Washing Powder and twenty-five cases Prosperity Washing Powder, now in the warehouse at Spruill's Bridge. This November 24, 1899. (Signed) A. Alexander."

The plaintiff introduced "Exhibit B," being an order signed by A. Alexander to the witness Spruill, agent, to deliver the property to the plaintiff. He also exhibited a receipt for freight, $4.50, given to A. Alexander—plaintiff paying the amount of the freight.

The plaintiff proposed to ask the witness if any other A. Alexander claimed the fifty boxes of Gold Dust in controversy. Defendant objected, objection sustained and plaintiff excepted.

The witness further testified that he did not see the plaintiff pay Arthur Alexander anything when the receipt was signed or at any other time; that the papers were written and signed in the warehouse at Spruill's Bridge, where the goods were; that Alfred Alexander had no middle name; that Arthur Alexander was reputed to be insolvent; that neither Arthur Alexander nor the plaintiff ever produced any bill of lading for the goods. The plaintiff proposed to ask the witness: "Did Alfred Alexander ever claim these goods?" Defendant objected, objection sustained and plaintiff excepted.

For the purpose of showing title in Arthur Alexander, the plaintiff proposed to prove that Arthur Alexander said, when he signed the bill of sale, that he had ordered the goods, and to show that he was claiming the goods. Defendant objected, objection sustained and plaintiff excepted.

The witness further testified: "I did not deliver the goods to the plaintiff because Alfred Alexander had the bill of lading." The plaintiff proposed to ask the witness if the defendant Fairbanks Company made any claim for the property while in his possession. Defendant objected, objection sustained and plaintiff excepted. The witness further testified that Dr. Abney Alexander lives near Columbia, N. C., and that is his post-office; he does not ship any goods at Creswell.

The plaintiff, introduced in his own behalf, testified that he lives in Columbia, and knew Arthur Alexander, had dealings with him about the property in controversy. Exhibits A and B were signed at the warehouse in Creswell, in the presence of C. T. Spruill; the goods were in the warehouse at the time, and he did not know of any controversy about the goods; bought the goods from Arthur Alexander, and paid the freight, $4.50, at that time; was to pay $100 for the goods, and did pay between $65 and $75; that he presented the order, "Exhibit B," to Spruill, the agent, who refused to deliver the goods, and that neither the witness nor Arthur Alexander ever had a bill of lading for the goods.

The plaintiff proposed to show by himself, for the purpose of showing title and for the purpose of showing that Arthur Alexander was the consignee, that Spruill, the agent of the defendant railroad company, said at the time the order was presented that he would see Alfred Alexander to ascertain whether he claimed the goods, and that Alfred told witness that he did not claim them. Defendant objected, objection sustained and plaintiff excepted.

The plaintiff then proposed to show by the witness that Arthur Alexander said, in the presence of C. T. Spruill and himself at the time "Exhibits A and B" were signed and the freight was paid, as to who ordered the goods and to

whom they belonged. Upon objection the testimony was excluded and plaintiff excepted.

The witness further testified that Arthur Alexander's father was David Alexander, and that he had known Arthur for a number of years; there was very little, if anything, paid on the purchase price of the goods, except the freight, before the suit was brought; he only knew Arthur Alexander by that name, and he had known of his selling goods that he had ordered; this was after the purchase of the property in controversy; he also testified in regard to the sale of a piano, and that when he bought the goods in controversy he did not know that Arthur Alexander had not paid for them.

The defendant introduced testimony tending to show that Arthur Alexander's name was Arthur Bennett Alexander, and that he was never solvent; that he commenced ordering goods in his own name soon after he was twenty-one years of age; that witness had a thousand claims against him, and he said that he would not pay them; that up to the time Arthur began to use his name, Alfred signed his name "A. Alexander"; at these times he used the name of A. Alexander; Alfred Alexander signed his name "Alfred," after Arthur Alexander used the name "A. Alexander"; that Alfred Alexander was worth from $15,000 to $20,000.

Alfred Alexander was introduced, and testified that his name was "Alfred Alexander; that he did not order the Gold Dust and did not own or claim it, and he told Spruill and the plaintiff so; that Arthur's name was Arthur Bennett Alexander"; that in the winter of 1897 Arthur told him he had dropped the "Bennett" from his name; in the spring of 1897 or 1898 the goods began to come to A. Alexander; that he received at least one hundred different lots of goods, and sold them and searched purchasers at low prices.

The defendant introduced the deposition of A. H. Sheckley, who testified that at the time of the shipment of the goods

he was Credit Manager for the defendant Fairbanks Company; that the goods were shipped by his order from the stock of said company, and that they were intended for Alfred Alexander, Creswell, N. C. The witness testified as to the value of the goods.

During the argument for the defendant, counsel stated to the jury that there was a wholesale conspiracy between Arthur Alexander and R. E. Sample to rob and cheat the people of their goods and to bring disgrace and shame upon the people of Tyrrell County. The plaintiff objected, and his Honor stated that there was no evidence as to R. E. Sample, but there was considerable evidence of fraud as to Arthur Alexander; that Woodley had stated that he had a thousand claims against him, and he would not pay any of them.

Counsel for the plaintiff in the closing argument, replying to the argument of the defendant, appealed to the jury not to do an injustice to the plaintiffs and stamp them with fraud and robbery by taking from the plaintiff the goods to which, under the evidence, he was entitled; and to answer the first issue "No," they would have to find that the witnesses Newberry and Spruill had been guilty of fraud. The counsel for the plaintiff stated this time that they could not find a verdict for the defendant without branding Newberry and Spruill as perjurers.

At the close of the argument the Court commenced its charge to the jury by saying that "You have nothing to do with the results of this case. You are to pass upon the facts, and it is not necessary for you to find that the plaintiffs had committed perjury to answer the first issue 'No.'" Plaintiff excepted. The Court further charged the jury that "If you believe from the evidence that Arthur Alexander fraudulently procured the property to be shipped to A. Alexander upon the financial standing of Alfred Alexander, and by

fraud and deceit procured the same to be shipped to A. Alexander, and the shipper intended them for Alfred Alexander, and the railroad company refused to deliver the goods to Arthur Alexander, and the plaintiff knew it at the time he purchased the goods from Arthur Alexander, then the plaintiff has no title, and he cannot recover in this action, and you should answer the first issue 'No.'" Plaintiff excepted.

The Court further charged the jury that "If you find from the evidence that Arthur Alexander by fraud procured the property to be shipped to himself and did not pay for it, and by the fraudulent use of the name of A. Alexander, fraudulently leading the shipper to believe that the order was from Alfred Alexander, and that the property was in the hands of the railroad company, which refused to deliver it to Arthur Alexander, and the plaintiff knew that the company was refusing to deliver it to him, then the plaintiff would not be entitled to recover and you should answer the first issue 'No.'" Plaintiff excepted.

The plaintiff requested the Court to charge the jury that upon all the evidence in the case, if believed, the plaintiff is the owner of the property in controversy, and the jury should answer the first issue "Yes." The Court refused to so charge and the plaintiff excepted. That if Alexander did practice fraud to procure the Gold Dust, there is no evidence to show that the plaintiff knew of it, and the jury should answer the first issue "Yes." Refused, and the plaintiff excepted. That if the jury find the defendant Fairbanks Company shipped the Gold Dust to A. Alexander upon his order, and the same was billed to A. Alexander, and that A. Alexander sold the same to the plaintiff, the jury should answer the first issue "Yes." Refused, and plaintiff excepted. That there is no evidence in this case that the defendant Fairbanks Company has not been paid in full for the goods

in controversy; there is no evidence sufficient to show that A. Alexander made any misrepresentations to the Fairbanks Company, and if the jury believe the evidence, there was no fraud practiced upon the defendant to obtain the goods, and the jury should answer the first issue "Yes." Refused, and plaintiff excepted.

The Court, upon request of plaintiff, instructed the jury that there was no evidence that the defendant railroad company claimed any interest in the goods in controversy. The plaintiff further requested the Court to instruct the jury that there was no evidence that the Fairbanks Company objected to the delivery of the goods to the plaintiff or to A. Alexander, and it was the duty of the defendant railroad company to deliver the goods upon the order of A. Alexander, and if the jury believed all the evidence they should answer the first issue "Yes." Refused, and plaintiff excepted.

The Court charged the jury that if they found from the evidence that the goods were shipped to Arthur Alexander without fraud on his part in obtaining them, or if he procured them by fraud, and the plaintiff had no notice of the facts constituting the fraud when he bought the goods, then they should answer the first issue "Yes." The plaintiff appealed from the judgment rendered.

George W. Ward and *E. F. Aydlett,* for the plaintiff.
W. M. Bond, for the defendant.

CONNOR, J., *after stating the facts.* The pleadings and testimony present for determination the simple question whether the plaintiff was the owner of the goods in controversy. To maintain this proposition it was incumbent upon the plaintiff to show that the title had passed from the Fairbanks Company to Arthur Alexander, from whom he purchased. It appears that there was in the neighborhood one person whose

real name was Arthur B. Alexander and another whose real name was Alfred Alexander. Conceding that Arthur ordered the goods in the name of A. Alexander and the Fairbanks Company shipped them, supposing that they were ordered by Alfred Alexander and intending to sell and ship to him, and not to Arthur, no title passed to the latter. In the name "A. Alexander" there was a latent ambiguity, due to the fact that there are two persons having the same initials and in the same neighborhood. It was clearly competent to show, by the testimony of the shipper of the goods, to which of these two persons he sold and consigned the goods. The testimony of the witness Sheckley is uncontradicted, and, if believed by the jury, puts an end to the controversy. There was no contract of sale by the owner of the goods to Arthur Alexander. This view of the case was presented to the jury by his Honor, and, without regard to the other questions discussed in this Court, their finding entitled the defendant to judgment.

The declarations of Arthur Alexander were clearly incompetent and were properly excluded. The plaintiff could not show title in Arthur Alexander by his declarations in the absence of the defendant, the goods never having been for a moment in his possession.

In the view we take of the case, the somewhat forcible remarks of the defendant's counsel were harmless. As the defendant Arthur Alexander did not see fit to enlighten the Court and jury by going upon the stand, and as the plaintiff did not himself contradict the testimony of Sheckley or Woodley, or offer any testimony to do so, we think his Honor was warranted in saying to the jury that it was not necessary to answer the first issue "No" to find the plaintiff guilty of perjury. While it was not necessary to pass upon the question of fraud, we think his Honor's observation: "That there was considerable evidence of fraud as to Arthur Alexan-

der," had abundant foundation from the uncontradicted testimony.

The judgment of the Court being that the defendant the Fairbanks Company is entitled to recover the value of the goods, it being admitted that they could not be delivered in specie, we find no error in the record or the judgment, and the same is

Affirmed.

MARCUS v. LOANE.

(Filed September 22, 1903.)

1. OPINION ON EVIDENCE—*Evidence—Negligence.*

In an action to recover damages for a personal injury, it is error for the trial judge, in his instructions, to say to the jury "Was it due care to put the boy in charge of the engine without warning?" where the main question in dispute was whether the boy was in charge of the engine without having been properly warned.

2. NEGLIGENCE—*Proximate Cause—Damages.*

In an action to recover damages for personal injuries, it is error to instruct that if the machinery was out of order, as contended by the plaintiff, and the defect was known by the defendant, the defect constituted a continuing negligence on the part of the defendant, and it was not contributory negligence on the part of intestate of plaintiff to do what he did, without adding "if the negligence of the defendant was the proximate cause of the injury."

ACTION by A. Marcus, administrator, against C. D. Loane and Company, heard by Judge *M. H. Justice* and a jury, at April Term, 1903, of the Superior Court of WASHINGTON County. From a judgment for the plaintiff the defendants appealed.

W. M. Bond and *Rodman & Rodman,* for the plaintiff.
H. S. Ward and *G. W. Ward,* for the defendants.

CONNOR, J. This is an action brought by the plaintiff administrator of Peter Marcus, deceased, for damages alleged to have been sustained by reason of the death of his intestate, caused by the negligence of the defendant. The plaintiff testified that he was the father of Peter Marcus; that the deceased was about fifteen years of age at the time of his death; that the deceased first worked on the lumber yard of the defendant, and quit and went in the house at defendant's mill about nine or ten days before he was hurt. The testimony tended to show that the deceased was employed at the defendant's lumber mill to oil machinery, and that on his attempting to turn the throttle of the engine it exploded, whereby he was scalded by hot water from the pipes, which resulted in his death.

The theory of the plaintiff was that his intestate was employed to manage and operate the engine and was not properly educated in respect to the duty, was too young to be put at such work, that he was directed by the engineer to start the engine, and that the engine was in a defective condition.

The theory of the defendant was that the plaintiff's intestate was acting outside of the sphere of his employment, turned the throttle without the knowledge of the defendant and without any direction to do so, and failed to turn the relief valve below the throttle before turning the throttle, and that as a natural consequence of the act, the engine having been at a standstill for several hours by reason whereof the steam in the pipes just next to and above the throttle had condensed into water, the pressure of the volume of water behind from the pipes thus set in motion became irresistible.

The testimony in respect to the several contentions was conflicting.

His Honor in charging the jury said that "It was the duty of the defendant, if he directed the plaintiff's intestate to manage the engine and turn on the steam or allowed him to do so in the course of his duties, and if the defendant knew that he was young and inexperienced, to instruct him as to its danger, and to use due care in directing his attention to the danger, if any, connected with the engine and valve. It would be negligence in the defendant if he employed a boy fifteen years old without experience and put him to running an engine without giving him careful instructions how to use it, and if that was the proximate cause of the injury, you should answer the first issue 'Yes.'" To this portion of the instruction no objection can be sustained. It was entirely correct. His Honor proceeded immediately to say to the jury: "Was it due care to put the boy in charge of the engine without warning him of the danger, if any, and if not, was that the proximate cause of the injury?" and then to say: "It was the duty of the defendant to exercise due care in the employment of the boy to do such work as that of managing dangerous machinery, that is, was the hiring of a fifteen-year-old boy to run a mill and manage machinery without warning him of danger, if any, a thing that a prudent business man under the same circumstances would do? Was it due care to put the boy in charge of the engine without warning? Would a reasonable and prudent man do it, and, if not, was that the proximate cause?—that's the question." To this charge the defendant excepted, alleging as ground for his exception that his Honor expressed the opinion, or assumed it as proved, that the boy was employed to manage the engine. His Honor used the expression, "was it due care to put the boy in charge of the engine?" later, repeating this language and saying further: "Was the hiring of a fifteen-year-old boy

to run a mill and manage the machinery, etc." The rule laid down by his Honor for measuring the defendant's duty, assuming that the jury should find that the deceased was employed to manage the machinery or to run the engine, was clearly correct. The complaint of the defendant is that he assumed the very fact in issue to have been shown; that he should have said to the jury that if they found from the testimony, etc. We are of the opinion, upon a careful examination of the entire charge, that his Honor inadvertently fell into error in the language complained of. The form of expression adopted by him was calculated, we think, to create in the mind of the jury the impression that the only question for them to decide was whether the hiring of a boy of the age of the deceased and putting him in charge of dangerous machinery or running an engine was negligence. If that fact had been found by the jury, with the further fact that he was not properly instructed or properly warned of the danger, the instruction in respect to the law would have been entirely correct; but when the Judge said to the jury "was it due care to put the boy in charge of the engine without warning?" "would a reasonable and prudent man do it, and, if not, was that the proximate cause?—that's the question"—he withdrew from the jury the duty of ascertaining from the testimony whether the defendant had done the very thing upon which the right of the plaintiff to recover depended, which we think was an expression of opinion in regard to a vital question in controversy. He further instructed the jury that "If you find that the taps had been left off the screws that hold on the throttle-cap, this was a continuing negligence on the part of the defendant, and continued up to the time of the explosion, even though the boy might have ascertained it, and if you find that to be the fact and that was the proximate cause of the injury, you will answer the second issue 'No.'" This instruction is correct, but his Honor

proceeded to say to the jury that "If the machinery was out of order, as contended by the plaintiff, and that defect was known to the defendant, or might by reasonable diligence have been known, that defect constitutes a continuing negligence on the part of the defendant, because it was his duty to furnish the plaintiff's intestate with safe and sound machinery, and, if that was the case, it was not contributory negligence in the boy to fail to turn the relief valve, if he did, before turning on the steam, and you will answer the second issue 'No.'" This is practically a repetition of the instruction immediately preceding, omitting, however, the very important inquiry whether such negligence "was the proximate cause of the injury." The negligence of the defendant must be the proximate cause of the plaintiff's injury to constitute an actionable wrong, and in this respect the last instruction was defective. The jury should not say that because the machinery was out of order the plaintiff was entitled to recover; they must go further and say that the machinery being out of order was the proximate cause of the injury before they can answer the issue in favor of the plaintiff. "The negligence of the defendant, no matter how great, would not of itself render it liable in damages, unless it had contributed to the death of the plaintiff's intestate." *Edwards v. R. Co.*, 129 N. C., 78.

For these errors the defendant is entitled to a

New trial.

STORY v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed September 22, 1903.)

1. CARRIERS—*Passengers—Damages—The Code, sec. 1963.*

In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, evidence that he was on the train intoxicated at another time is not competent.

2. DAMAGES—*Exemplary—Punitive—Carriers—Passengers.*

In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult.

3. EVIDENCE—*Damages—Exemplary Damages—Carriers.*

There is in this action for damages for refusal to allow a person to board a train sufficient evidence of insult or other aggravating circumstances to be submitted to the jury on the question of punitive damages.

4. CARRIERS—*Passengers—Evidence.*

In an action for damages for refusal to allow a person with a ticket to board a train, the trial court properly refused to instruct that the conductor, in refusing, might consider that the same person had given him trouble at other times.

ACTION by S. C. Story against the Norfolk and Southern Railroad Company, heard by Judge *H. R. Bryan* and a jury, at May Term, 1903, of the Superior Court of PERQUIMANS County. From a judgment for the plaintiff the defendant appealed.

W. M. Bond, E. F. Aydlett and *W. J. Leary,* for the plaintiff.

Pruden & Pruden, for the defendant.

STORY *v.* NORFOLK AND SOUTHERN RAILROAD COMPANY.

CLARK, C. J. The plaintiff, having purchased a ticket home, presented himself at the gate 5th June, 1902, at Elizabeth City, when the conductor opened it at the arrival of the train about 10 A. M. The conductor refused to permit him to enter. The plaintiff testified that he put his hand on his breast and pushed him back, saying: "You cannot go"; that he told the conductor that he had his ticket, that his family was sick and he was sick; that the conductor replied: "You are drunk and cannot go"; that he was refused entrance to the cars and was compelled to walk home, ten miles; that he was sick and had to sit down on the end of the cross ties to rest, and did not get home until about 12 o'clock at night; that his feelings were hurt, and he was worried and humiliated; that there were over 100 people in the depot; that he was not drunk and did not have a bottle in his hand, and that he had no money to hire any other conveyance home. Three other witnesses testified that they saw the plaintiff on the platform and talked with him; that "he was not drunk and showed no signs of being drunk, but was quiet and peaceable and was so when he attempted to go to the train."

The conductor testified that the plaintiff was drunk and staggering, and missed the gate the first attempt he made to enter; that he saw two quart bottles in the plaintiff's arms with something in them; that he told the plaintiff: "I cannot let you go; you are a nuisance to my passengers; I have been troubled with you all that I intend to be"; that the plaintiff promised to behave, but he declined to admit him, that he did not touch the plaintiff, but just reasoned with him and had no harm or feeling against him. The conductor also testified (over plaintiff's objection) that the plaintiff had been on the train several times before, that he was generally drunk when getting on the train at Elizabeth City, boisterous, abrupt and profane, and passengers had complained; that on the day before he was on the train and behaved badly.

The chief of police said he saw plaintiff stagger, and three employees of the defendant testified that from the appearance of the plaintiff they thought he was drunk. There was other evidence more or less corroborative on both sides.

The defendant offered to ask another witness what was the plaintiff's conduct and condition on this conductor's train 22 March, 1903, with a view of showing that he was drunk and disorderly, so that passengers left the train. This was properly excluded. The right of a conductor to exclude him from the train 5 June, 1902, depended solely upon his condition at that time.

The Court properly charged the jury that if the plaintiff was drunk, then the defendant had a right to refuse to admit him on the train, and he could not recover any damages. Common carriers have a right, and indeed it is made their duty by Laws 1885, ch. 358, sec. 2, to refuse carriage to any intoxicated person, both on account of the danger of injury to him and his liability to become a nuisance to the other passengers. 3 Thomps. Dig., sec. 3092; *Murphy v. Railroad,* 118 Mass., 228; *Williams v. Railroad,* 66 N. Y., 642.

Besides the parts of the charge not excepted to and hence not sent up, the Court charged: "If the plaintiff had a ticket and was sober and offered to go on the train and was refused, he is entitled to recover the actual damages that he sustained, and if the refusal to allow him to go on the train was attended with undue force or other aggravating circumstances calculated to humiliate him or wound his pride, or undue force accompanied with fraud, malice, rudeness or other wilful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts," and the defendant excepted. "That if you find from the evidence that the plaintiff was, at the time of his exclusion, really sober and entitled to enter the cars, had his ticket and presented himself and was refused, then he would be entitled to recover only such actual dam-

ages as he sustained by the wrongful act of the conductor (unless the act was done with fraud, malice, undue force or insult), in which would be included such sum as he may have paid for his ticket, with interest thereon, together with the reasonable cost of reaching his home by some other route, and compensation for the extra time lost to him by the wrongful act of the conductor; in estimating the actual damages suffered by him, you will not consider the fact that he or his family was at the time sick or any consequences growing out of that sickness, unless you find that the conductor knew of his physical condition at the time of his exclusion." This charge was given at the request of the defendant (and hence is not passed on by us), except the words found in parenthesis, which the Court added, and to the addition of these words the defendant excepted.

The defendant requested the Court to charge the jury as follows: "In this case there is no evidence of such fraud, malice, wantonness, insult or other aggravation which will justify the jury in assessing punitive damages." Refused, and the defendant excepted.

There was evidence, which the jury evidently found to be true, that the plaintiff was not drunk, but quiet and orderly, and that though he had a ticket in his hand entitling him to passage, the conductor rudely thrust him back in the presence of a large crowd, telling him he was drunk and was a nuisance, and refused him the passage he was entitled to, though he told the conductor he was sick and his family were sick, and causing him to walk ten miles home, which he reached at midnight. The Court could not, therefore, give the last prayer that there was no evidence of "wantonness, insult or other aggravation," justifying the assessment of punitive damages, and the charge above excepted to and the insertion in the last paragraph were not erroneous. *Purcell v. Railroad,* 108 N. C., 414 (3d headnote); 12 L. R. A., 113; *Hansley v. Railroad,* 117 N. C., at

pp. 569, 571; 32 L. R. A., 543; 53 Am. St. Rep., 600; 3 Sutherland on Damages, secs. 535, 537.

The defendant further requested an instruction "that if the plaintiff had before that time gone on the train of the defendant and been offensive and troublesome to other passengers and to the defendant's employees, and this was known to the conductor, then he might consider that fact upon the occasion complained of in deciding whether to admit the plaintiff on the train." This was also properly refused. That the conductor did consider the plaintiff's former conduct and not his conduct on this occasion was evidently the fault entitling the plaintiff to recover. A common carrier must treat all passengers alike. If the plaintiff, with a ticket and quiet, sober and orderly, presented himself for transportation on 5 June, 1902, he had the same rights as any other person whatsoever in the same condition. Common carriers can establish no "habitual criminals" regulations. The Code, sec. 1963, is mandatory that railroad companies shall take, transport and discharge passengers and property at the usual stopping places "on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises." That one offering himself as a passenger has on other occasions been disorderly and offensive on the train is reason why the conductor should be critical in scrutinizing his condition when he offers to enter, and more observant of his conduct when on the train to prevent annoyance to passengers, but does not excuse him if by reason of the plaintiff's conduct on other occasions he wrongfully refused him carriage when in proper condition and armed with a ticket.

The verdict of the jury (and we must take it that they found the facts correctly) seems to be that the conductor was prejudiced against the plaintiff by reason of his former conduct (for he says he told the plaintiff: "I have been troubled

with you all I intend to be"), and wrongfully rejected him as a passenger, with rudeness, wantonness and insult, thrusting him back and charging him with being then drunk in the presence of a large crowd, and unjustifiably causing him a ten-mile walk homeward, with a railroad ticket in his pocket. The moderate verdict ($125) shows, too, that the jury considered all the circumstances of the case and gave weight to the plaintiff's precedents in assessing the humiliation he suffered.

Conductors have many aggravations, almost as many, perhaps, as policemen, but both classes must, perforce, keep their equanimity when on duty. It is the function of neither to punish any one by any discrimination in the discharge of their duties to the public.

No error.

STRAUSE v. SAWYER.

(Filed September 22, 1903.)

NONSUIT—*Dismissal—The Code, sec. 936.*

It is too late after verdict upon an issue or issues of fact for a plaintiff to take a nonsuit; and where the jury, after rendering a verdict, had returned to the jury room to correct a mere formal defect in the verdict, and as they retired the counsel for plaintiff informed the trial judge that the plaintiff would take a nonsuit, there was no error in refusing it.

ACTION by I. I. & M. M. Strause against John L. Sawyer and T. C. Jones, heard by Judge *Frederick Moore* and a jury, at November Term, 1902, of the Superior Court of PASQUOTANK County. From a judgment for the defendants the plaintiffs appealed.

W. M. Bond, for the plaintiffs.
E. F. Aydlett, for the defendants.

MONTGOMERY, J. This action was instituted for the recovery of the contract price for a bill of clothing sold and delivered by the plaintiffs to the defendants. The defendants refused to receive the goods, and in their answer denied that the goods were according to sample by which they were sold. Only one issue was submitted to the jury: "Are the defendants, John L. Sawyer and T. C. Jones, indebted to the plaintiffs, and if so in what amount?" And for their answer the jury returned a verdict "Nothing." His Honor read the issue and verdict to the jury and asked the jury if that was their verdict. They said "Yes." The Judge then said that he had instructed them that if they found the verdict in favor of the defendants, their answer to the issue should be "No," and that in the light of that instruction they should retire and write their answer to the issue. The jury retired from the Court room to the jury room, and about one-half of them had entered the jury room and the others were near the door of the jury room when the plaintiff's counsel addressed the Court and said: "May it please your Honor, the plaintiffs take a non-suit." The jury remained out about a minute and then returned to the court-room with the issue answered "No." The Court received this verdict and had it recorded as the verdict of the jury. Before the verdict was ordered to be recorded by the Court, the plaintiff's counsel tendered to the Court a judgment of non-suit, which the Court refused to sign. The verdict which was returned, "Nothing," was a substantial compliance with his Honor's instruction to the jury as to how they should respond in case they should find upon the evidence the issue in favor of the defendants. The defect in that response of the jury was only formal; and while his Honor could not be said to be in error in sending the jury back for a more technically correct verdict, yet it was not necessary for him to have done so. If the verdict, "Nothing," had been indefinite, or uncertain, or meaningless, and on that

account the jury had been sent back for a proper verdict, then the motion of the plaintiff's counsel for a non-suit should have been granted; but, as we have said, it was not uncertain or meaningless, and no one knew that better than the counsel of the plaintiffs. He understood with certainty that the verdict was against his client. It is too late after verdict upon an issue or issues of fact for a plaintiff to take a nonsuit. The Code, sec. 936; *Purnell v. Vaughan,* 80 N. C., 46; *McKesson v. Mendenhall,* 64 N. C., 502. If a counter-claim is set up in the answer, a non-suit cannot be taken by a plaintiff at any stage of the proceedings. But there was no counter-claim in the answer in this action, and that point does not arise.

We have examined carefully the other exceptions in the case—all of which relate to evidence—and they cannot be sustained.

No error.

SMITH v. PAUL.

(Filed September 22, 1903.)

VERDICT—*Jury—Polling of Jury—Constitution, Art. I, secs. 13, 19.*

Either party to a civil action is entitled to have the jury polled.

ACTION by Lola I. Smith against J. A. Paul, heard by Judge *Frederick Moore* and a jury, at December Term, 1901, of the Superior Court of BEAUFORT County. From a judgment for the defendants the plaintiffs appealed.

E. S. Simmons, for the plaintiffs.

Small & McLean and *Charles F. Warren,* for the defendants.

WALKER, J. This is an action for the recovery of real property. In order to determine the conflicting claims of the

parties, the Court prepared and submitted the issues set forth in the record. It is unnecessary that we should examine and pass upon the numerous exceptions of the plaintiffs, as we think that one of their exceptions was well taken, and the ruling of the Court to which this exception was taken entitles them to a new trial. The other questions may not again be presented for decision.

The jury returned a verdict upon the issues which the plaintiffs contended was complete and sufficient to warrant a judgment in their favor, but the Court thought otherwise, and, having held that the judgment was contradictory and insensible, directed the jury to retire and reconsider their verdict, instructing them at the same time how, if they believed the evidence, they should answer the several issues. The jury afterwards returned a verdict in favor of the defendants. The plaintiffs objected to the Court receiving this verdict, the objection was overruled and the plaintiffs then requested that the jury be polled. The Court refused to have the jury polled, and the plaintiffs excepted. This presents a new question for our decision.

In *State v. Young,* 77 N. C., 498, it was held that in a criminal case the defendant, "and of course the solicitor," has a right to have the jury polled, whether an oral or a sealed verdict is rendered. *State v. Toole,* 106 N. C., 736; *State v. Best,* 111 N. C., 638. In some of the States the Courts have said that in civil cases neither party is entitled to poll the jury as a matter of right, but the Court may, in the exercise of its discretion, permit either party to do so. We believe, though, that the weight of authority is the other way and the right to poll the jury is the same in civil as in criminal cases. The reason for permitting the Solicitor or the defendant to exercise this right in a criminal case must certainly apply with equal force to a civil action. In *State v. Young, supra,* the Court say: "At this time (when the verdict is received) any

juror can retract on the ground of conscientious scruples, mistake, fraud or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and, as an incident to jury trials, would seem to be a constitutional right, and its exercise is only a mode, more satisfactory to the prisoner, of ascertaining the *fact* that it is the verdict of the whole jury." If the right to a unanimous verdict is the reason, or one of the reasons, for allowing the party to poll the jury in order to ascertain that such a verdict has been rendered, the same reason can be urged with as much force in a civil as in a criminal case in support of the right, for, while the right to a unanimous verdict is expressly guaranteed by the Constitution in criminal cases (Article I, sec. 13), it is by the clearest implication also guaranteed in all controversies respecting property, and, indeed, the "ancient mode of trial by jury" has, by the Constitution (Article I, sec. 19), been preserved to the citizen at least in all courts of superior jurisdiction, without regard to the nature of the controversy, whether civil or criminal, and by that ancient mode a unanimous verdict was required, and accordingly it has been held that in all civil suits the verdict must be unanimous. *Owens v. Railroad*, 123 N. C., 183; *Lowe v. Dorsett*, 125 N. C., 301. There is no good reason, therefore, why the same right to poll the jury in order to ascertain whether all of the jurors have agreed to a verdict should not be accorded in civil cases in the same manner and to the same extent as in criminal prosecutions, and we think that it will be found, upon examination of the decided cases, that in most of the States either party may claim as a right to have the jury polled, and that a denial of this right is an error in the proceedings, provided the party asserting the right has not lost it by his own laches or has not in some way waived it. It has been so held in the following cases: *Fox v. Smith*, 3 Cowen, (N. Y.), 23; *Rigg v. Cooke*, 4 Gilman (Ill.), 336; *Bishop v.*

Mugler, 33 Kan., 145; *Jackson v. Hawks,* 2 Wend. (N. Y.), 619; *Maduska v. Thomas,* 6 Kan., 153. In *James v. State,* 55 Miss., 57, the Court says: "A verdict is the unanimous decision made by a jury and reported to the Court. Examining the jury by the poll is the only recognized means of ascertaining whether they were unanimous in their decision, and the right to do this must exist. It is affirmed in criminal cases, and is equally applicable in civil cases. In no other way can the right of the parties to the concurrence of the twelve jurors be so effectually secured as by entitling them to have each juror to answer the question, 'is this your verdict?' in the presence of the Court and parties and counsel. By this means any juror who had been induced in the jury room to yield assent to a verdict against his conscientious convictions may have opportunity to declare his dissent from the verdict as announced. Parties should have the means to protect themselves against the consequences of undue influence of any sort, which, employed in the privacy of the jury room, may extort unwilling assent to a given result by some of the jury. Less evil is likely to result from upholding the right to have the jury examined by the poll than from denying it." In *Warner v. Railroad,* 52 N. Y., 437, it is said by the Court: "Nor is there any doubt of the right of either party to poll the jury, on the rendition of a verdict by the foreman, at any time before it is recorded; and this although the verdict has been a sealed one and the jury have separated before bringing it in, unless the right to poll has been expressly waived." In *Norvell v. Deval,* 50 Mo., 272, the Court says: "They (the jurors) must all be present in court when the verdict is rendered. This has always been the universal practice, and it would be dangerous to the rights of litigants to adopt any other rule. Either party has the right to poll the jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman. The par-

ties have the right to know of each juror whether the verdict rendered is his, and this can only be done by polling the jury before they are discharged. The verdict is not perfect till it is delivered to the Court by the jury in the presence of all of them." In the case of *Koon v. Insurance Co.*, 104 U. S., 106, the right to poll the jury in a civil case is fully recognized.

It would appear, therefore, that when unanimity is required, any party to be affected by the verdict can demand, as a matter of right, to have the jury polled, and it is not to be regarded merely as a privilege which may be granted or withheld at the discretion of the trial court. As it is necessary that the jurors should all concur in the verdict, both in civil and criminal cases, it follows as a matter of course that the right to poll the jury is common to both of them.

In *State v. Young, supra,* this Court cites with approval the case of *Jackson v. Dale* (it should be *Fox v. Smith),* 3 Cowen (N. Y.), 23, in which it is held that the right to poll the jury extends to civil cases. The requirement that the verdict of the jury must be unanimous would be of little avail to a party if he has no means of ascertaining whether this unanimity exists, independent of the will or discretion of the Court. If it is his right to have a unanimous verdict, it must be his right in some way to establish the fact that it is not unanimous.

The jury, it seems, in this case completely reversed their verdict, and it may be that the plaintiffs, if they had been allowed to avail themselves of the right to poll the jury, could have disclosed the fact that the jurors had not all agreed to the verdict. If so, they have lost an important advantage in the litigation, to which they were clearly entitled. They had not waived their right to poll the jury, but, on the contrary, strenuously insisted upon it.

The Court committed an error in refusing to permit the jury to be polled, and for this error there must be a new trial.

New trial.

FARRAR v. HARPER.

(Filed September 29, 1903.)

1. LIMITATIONS OF ACTIONS—*Homestead—Act 1869-'70, ch. 121—Acts 1885, ch. 359—Acts 1887, ch. 17—Acts 1901, ch. 612—Judgments.*

Acts 1885, ch. 359, does not suspend the running of the statute of limitations on a judgment until there has been an actual allotment of the homestead.

2. LIMITATIONS OF ACTIONS—*Homestead—Judgments—Acts 1901, ch. 612.*

Acts 1901, ch. 612, giving two years within which to allot a homestead and thereby preventing the running of the statute of limitations against a judgment, does not apply to judgments taken more than ten years before the passage of the said act.

ACTION by Farrar, Wright & Co. against A. E. Harper, heard by Judge *George H. Brown,* at March Term, 1903, of the Superior Court of EDGECOMBE County. From a judgment for the plaintiff the defendant appealed.

G. M. T. Fountain, for the plaintiff.
James M. Norfleet, for the defendant.

WALKER, J. This is a motion for leave to issue execution under section 440 of The Code. The plaintiffs obtained judgment against defendant in the court of a justice of the peace on December 17, 1888, for $128.52, and on the same day caused it to be docketed in the Superior Court. An execution

was issued on this judgment on the 8th of December, 1892, but it appears to have been issued without notice, as required by section 440. This fact, though, is immaterial in the view we take of the case. No other execution has ever issued on the judgment. The motion for leave to issue execution was made and the plaintiffs' affidavit filed on the 19th day of February, 1903, so that ten years had elapsed between the time the execution issued, December 8, 1892, and the date on which this motion was made. No homestead has even been allotted to the defendant. The defendant, in answer to the motion and affidavit of the plaintiffs, relied upon the statute of limitations. The Clerk of the Superior Court, at the hearing, ruled that the statute did not bar the plaintiffs' judgment, and ordered execution to issue. The defendant excepted and appealed to the Superior Court, which Court affirmed the decision of the Clerk, and the defendant again excepted and appealed to this Court.

It was properly conceded by the plaintiffs' attorney on the argument that if the law, as declared in *McDonald v. Dickson,* 85 N. C., 248, has not been changed by subsequent legislation, the statute of limitations bars the plaintiffs' right to have an execution issued, as it was decided in that case that the running of the statute was not suspended by the Act of 1869-'70, chapter 121, until there had been an actual allotment of the homestead. The language of the Act of 1869-'70, which was construed in that case, is as follows: "The statute of limitations shall not run against any debt owing by the holder of the homestead affected by this act during the existence of his interest in the homestead." The plaintiffs contend, though, that the law in that respect has been changed by subsequent enactments of the Legislature.

In *Markham v. Hicks,* 90 N. C., 204, the Court called attention to the fact that the Act of 1869-'70 had not been incorporated in The Code of 1883. At the next session of

the General Assembly—that is, in the year 1885—an act was passed which, as amended by the Act of 1887, chapter 17, to correct a verbal mistake, reads as follows: "The statute of limitations shall not run against any judgment against the owner of a homestead or homestead interest during the existence of such homestead or homestead interest, whether the same has been or shall hereafter be allotted, assigned and set apart under execution or otherwise." It will be observed that this statute, in its language, so far as it relates to the actual allotment of the homestead, is almost identical with the Act of 1869-'70 and is certainly substantially so. The Act of 1869-'70 provided that the statute of limitations should not run "during the existence of his (the debtor's) interest in the homestead," and the Act of 1885, as amended by the Act of 1887, provides that "the statute shall not run against any judgment against the owner of a homestead or homestead interest during the existence of such homestead," etc. There is manifestly not enough difference, so far, in the phraseology of the two acts to cause us to give them different interpretations. Both must mean the same thing. If the Act of 1885 stopped where we have left off in the quotation taken from it, the plaintiffs, perhaps, would not insist that the two acts are not identical in meaning, though there is some slight difference in the form of expression, but they contend that the provision in the Act of 1885 that the statute shall not run during the existence of the homestead is qualified by the words "whether the same has been or shall hereafter be allotted, assigned and set apart under execution or otherwise," and that the last quoted words were intended to change, and do change, the law as declared in *McDonald v. Dickson, supra,* and that it has not been required, since the passage of the Act of 1885, that the homestead should be actually allotted, provided the debtor's land is worth less than $1,000. We are unable to take this view of the question, but rather think that the Act of 1885,

by the very language last quoted, shows that the Legislature contemplated and intended that there should be an actual allotment before the running of the statute should cease. The language of the Act of 1885 manifests a purpose on the part of the Legislature to accept and confirm the construction of the Act of 1869-'70 by this Court in *McDonald v. Dickson, supra.* It seems to us that any other interpretation of the said acts, which would suspend the operation of the statute of limitations before the homestead has been allotted, would not only contravene the spirit and intent of the law, but would be attended, as so clearly pointed out by *Ruffin, J.*, in *McDonald v. Dickson,* with great inconvenience and uncertainty. We cannot conclude that the Legislature intended to change the wise and well-conceived policy declared in the Act of 1869-'70 as construed by this Court, and to substitute one which would render the rights and liabilities of parties to judgments so uncertain and indeterminate.

The plaintiffs next relied on the Act of 1901, chapter 612, which amends the Act of 1885, so that it now reads as follows: "The statute of limitations shall not run against any judgment against the owner of any homestead or homestead interest during the existence of such homestead or homestead interest: *Provided,* the said homestead shall be actually assigned and set apart to the judgment debtor or homesteader before the expiration of ten years from the docketing of such judgment: *Provided further,* that the owners of judgments docketed since March 11, 1885, shall have two years from the ratification of this act within which to assign and set apart the homesteads under such judgments, etc." The contention is that, under this act, they have two years after the date of its ratification within which to have the homestead allotted, and they now ask that an execution may issue on their judgment, in order that this allotment may be made, but as to this contention, also, we think the plaintiffs must fail.

The judgment in this case was docketed on December 17, 1888, so that more than ten years had elapsed since the docketing of the judgment and before the Act of 1901 was ratified. The plaintiffs, therefore, can take no benefit from that act unless their case falls within the second proviso, to-wit, "that the owners of judgments docketed since March 11, 1885, shall have two years from the ratification of this act within which to assign and set apart the homesteads under such judgments." We think the plain meaning of the Act of 1885, as amended by the Act of 1901, is that the statute of limitations shall not run against any docketed judgment during the existence of an allotted homestead, provided the homestead is, or was, allotted within ten years after the docketing of the judgment, with the further proviso that if the ten years had not expired at the date of the ratification of that act the plaintiff should have two years within which to have the homestead allotted, and if it is allotted within that time the running of the statute should be arrested and the judgment should not be barred by the statute as to the land so set apart, but that at the expiration of the homestead such land might be subjected to the satisfaction of the judgment. If this construction is not placed upon the Act of 1901, full operation and effect cannot be given to both provisos. It is evident from the first proviso that the Legislature intended that the statute should not be suspended unless the homestead has been allotted within ten years after the docketing of the judgment. If the second proviso is allowed to apply to judgments docketed more than ten years before the ratification of the act, it will completely nullify the first proviso, and the rule of interpretation is that effect shall be given to each and every part of the statute, or that one part shall be so construed by another that the whole may (if possible) stand. 1 Blk. Com., 89. "It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different

parts of it, but effect should be given to each and every clause and provision." Black Interp. of Laws, p. 61.

It follows from what we have said that the Court below erred in holding that the statute of limitations did not bar the plaintiffs' right to have execution. The plaintiffs' motion should have been denied.

Reversed.

STANCILL v. SPAIN.

(Filed September 29, 1903.)

1. MORTGAGES—*Foreclosure of Mortgages—Equity of Redemption—Parties.*

The grantees of a mortgagor of a part of the land conveyed in the mortgage are necessary parties to an action for the foreclosure thereof.

2. LIMITATIONS OF ACTIONS—*Mortgages—Foreclosure of Mortgages—Parties—The Code, sec. 152, subsec. 3.*

The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations.

3. PARTIES—*Mortgages—Foreclosure of Mortgages—Abatement.*

Where a mortgagee dies pending a suit to foreclose a mortgage, the heirs or devisees of such mortgagee are necessary parties.

4. EVIDENCE—*Parol Evidence—Assignments.*

Where there is no evidence of the loss of a note, or that an alleged assignment thereof was in the handwriting of the payee, parol evidence is incompetent to show the assignment.

5. EVIDENCE—*Admissions—Mortgages—Description.*

Where the description of land in a mortgage is ambiguous, admissions by the deceased mortgagee are competent to show that certain land was not intended to be included in the mortgage.

6. ADVERSE POSSESSION—*Mortgages.*

The possession of the mortgagor or those holding under him is not adverse to the mortgagee.

7. PLEADINGS—*Limitations of Actions—Foreclosure of Mortgages—The Code, sec. 152, subsec. 3.*

In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded.

ACTION by G. A. Stancill against Alafair and Redmond Spain, heard by Judge *Garland S. Ferguson* and a jury, at April Term, 1903, of the Superior Court of PITT County. From a judgment for the defendants the plaintiff appealed.

Fleming & Moore, for the plaintiff.
Skinner & Whedbee, for the defendants.

CONNOR, J. This is an action for the recovery of the possession of a tract of land described in the complaint by metes and bounds, "containing by estimation 122 acres, more or less, and being a part of the land known as the Bensboro farm." The defendants denied that plaintiff was owner of the land or that they wrongfully withheld possession thereof. The general issue as to plaintiff's ownership was submitted to the jury. There was evidence tending to show that Peyton Atkinson, on July 14, 1847, purchased the land in controversy from one Rives; that, upon his death, in a proceeding for partition of his land, a tract known as the "Bensboro lands," containing 1,387 acres, was allotted to his son, Benjamin S. Atkinson; that on February 5, 1878, the said Benjamin S. Atkinson executed a mortgage conveying the "Bensboro lands," containing 1,437 acres, to Mrs. S. V. Whitehead, for the purpose of securing the payment of a note of $19,200 to be due January 1, 1883. Said mortgage was duly recorded. That Benjamin S. Atkinson and his wife, on the — day of

April, 1887, conveyed the land in controversy to Marcellus Moore; that by successive conveyances the title of Moore vested in the *feme* defendant; that Benjamin S. Atkinson died in the year 1884; that at March Term, 1895, of Pitt Superior Court, an action was instituted by S. V. Whitehead against L. C. King (widow of B. S. Atkinson who had intermarried with one King) and the children of said B. S. Atkinson. Neither Marcellus Moore nor those claiming under him were made parties to this action. Mrs. Whitehead died pending the action, and R. L. Davis, her executor, was made party plaintiff. At December Term, 1897, of said Court a decree was passed directing a sale of the land described in the mortgage, and pursuant thereto B. F. Tyson, commissioner, sold and conveyed the same to plaintiff on March 17, 1899. The description in the deed was the same as that in the mortgage. Mrs. S. V. Whitehead was at the date of said mortgage and at all times thereafter until her death, a *feme covert,* living separate and apart from her husband. Plaintiff introduced evidence tending to show that the land in controversy was a part of the "Bensboro lands." Defendant introduced testimony tending to show that it was not a part of the said lands and that it was known as the "Rives tract." There was evidence tending to show that Marcellus Moore was, by his tenants, at sometime after his purchase from Benjamin S. Atkinson, in possession of the land in controversy. There was also evidence tending to show that for a year or two no one was in the actual possession thereof. The plaintiff interposed a large number of exceptions to the rulings of his Honor upon the admission of testimony, many of which, in the view which we take of the case, are immaterial. Whether the mortgage executed by Benjamin S. Atkinson to Mrs. Whitehead included the land in controversy is a question of fact which was submitted to the jury under instruction by the Court upon the general issue. We cannot say whether their negative response

was based upon the acceptance of the defendant's contention in this respect or was reached by their conclusion in regard to other questions submitted to the jury by the Court. While this question was not upon the pleadings, presented in the form of an issue as defined by section 391 of The Code, it was upon the evidence so presented that its determination by the jury in the negative would have put an end to the controversy. We think that it would have been well for the Court, pursuant to the provision of section 399 of The Code, to have submitted this "specific question of fact" to the jury. *Quarles v. Jenkins*, 98 N. C., 258. Assuming, for the purpose of disposing of this appeal that the land in controversy is included in the mortgage, the record presents the following state of facts in regard to the title:

The legal title vested in Mrs. Whitehead by virtue of the mortgage, the equity of redemption remaining in B. S. Atkinson. The deed executed by Atkinson and wife to Marcellus Moore vested in him the equity of redemption, and by successive conveyances this equitable estate or right vested in the defendants. The defendants, therefore, were necessary parties to the action to foreclose this mortgage in so far as it was sought to affect the title to the land in controversy. They were entitled to a day in Court to the end that they might set up not only all defences that were available to Atkinson, but also to insist that the plaintiff should be compelled to exhaust the remainder of the land conveyed by the mortgage for the payment of the note before resorting to the portion conveyed to them. "The rule of equity is that where one creditor can resort to two funds for the satisfaction of his debt, and another to only one of the fund, the former shall first resort to the fund upon which the latter has no claim, as by this means of distribution both may be paid. And it is an analagous principle of equity that when a debtor whose lands are encumbered by a judgment sells one portion of it, the creditor, who has a

lien upon that which is sold and upon that which is unsold, shall be compelled to take his satisfaction out of the undisposed-of land, so that thus the creditor and purchaser may both be saved." *Jackson v. Sloan*, 76 N. C., 306; *Francis v. Heiren*, 101 N. C., 507. The defendants, if made parties to the action for foreclosure, could have pleaded the statute of limitation, The Code, sec. 152 (3). Whether it would have availed them in view of the fact that Mrs. Whitehead was at all times under coverture, but living separate and apart from her husband, presents several interesting questions which we do not think best, in the present condition of the record, to decide. It is not presented because it is not pleaded. The plaintiff sues and relies upon his legal title. He is confronted with the difficulty that Mrs. Whitehead died pending the foreclosure proceeding and her executor alone and not her heirs at law or devisees are made parties; hence the legal title was not by the decree or the sale made thereunder divested out of them or vested in the plaintiff. They were necessary parties to that end. *Etheridge v. Vernoy*, 71 N. C., 184. The defendants, or those under whom they claim, not having been made parties, the equitable estate which passed to them by the deed of B. S. Atkinson was not affected or foreclosed by the judgment or sale. It follows, therefore, that the plaintiff cannot recover the land in this action in the present condition of the pleadings. Neither the legal nor the equitable title has vested in him. It is true that it appears that B. S. Atkinson was the son of S. V. Whitehead, and that his children are heirs at law, but it further appears that she made a will, and we cannot say from the record whether they are her devisees, or if she died intestate *quoad* this property, whether they are the only heirs at law. We are of the opinion that a new trial should be ordered and the cause remanded, to the end that the necessary parties be made and the pleadings so amended that the rights of all parties may be passed upon and adjudicated.

It may, in view of the argument before us, be proper to say that there was error in permitting the defendant to show a written assignment of the note of B. S. Atkinson by the testimony of S. V. Joyner, to which the plaintiff duly excepted. There was no evidence that the note was lost or that the transfer was in the handwriting of the payee. We are of the opinion that his Honor was correct in admitting the declaration of Mrs. Whitehead for the purposes to which he restricted them, to show that the land in controversy was not understood or intended by the parties to be included in the mortgage. The description in the mortgage is ambiguous, and parol evidence is competent to explain and fit the description of the thing. The declaration was not competent for any other purpose. If it shall appear by competent evidence that the note was transferred by Mrs. Whitehead to Mrs. L. C. Atkinson and that the latter became discovert in 1884, thus putting the statute in operation against her, an interesting question would be presented. But as it is not presented by the record or argued before us, we think it best to express no opinion in regard to it. The possession of Marcellus Moore and those claiming under him cannot ripen into title against Mrs. Whitehead, because they took and held title to the land in subordination to the mortgage. *Parker v. Banks*, 79 N. C., 480. "Mortgagor is tenant of the mortgagee, and, therefore, his possession is not adverse. The possession of the mortgagor and those who claim under the mortgagor is the possession of the mortgagee, and the mortgagor remains only by permission of the mortgagee." We do not understand his Honor to have held otherwise, but he instructed the jury that if Marcellus Moore and those claiming under him had been in the possession of the land for ten years, this would be a bar to the plaintiff's recovery. In the condition of the pleadings this charge was erroneous, because the ten-years bar, section 153 (3) of The Code, can only be set up by answer. It is well settled that the

defendant may, under the general issue, rely upon the possession for seven years under color of title. But, as we have seen, this defense is not open to the jury, for the reason just stated. We have not passed upon the exceptions in their order, because, as we have said, they were not presented upon the pleadings. We therefore order a new trial, to the end that the parties may amend their pleadings as they may be advised, making such other parties as may be necessary.

New trial.

BUTTS v. ATLANTIC AND NORTH CAROLINA RAILROAD CO.

(Filed September 29, 1903.)

1. EVIDENCE — *Sufficiency of Evidence—Negligence—Nonsuit—Crossings.*

   The failure of an engineer to ring the bell or sound the whistle on approaching a crossing is some *evidence* of negligence.

2. EVIDENCE—*Negligence—Railroads.*

   That a person listening at a crossing fails to hear the ringing of the train bell or the sounding of the whistle is some evidence that neither was done.

3. NEGLIGENCE—*Proximate Cause.*

   An instruction which makes the liability of the defendant depend on its negligence, without regard to whether such negligence was the proximate cause of the injury, is erroneous.

ACTION by Z. V. Butts against the Atlantic and North Carolina Railroad Company, heard by Judge *G. S. Ferguson* and a jury, at February Term, 1903, of the Superior Court of CRAVEN County. From a judgment for the plaintiff the defendant appealed.

L. J. Moore and *D. L. Ward,* for the plaintiff.

W. C. Munroe and *Simmons & Ward,* for the defendant.

DOUGLAS, J. This is an action to recover damages for personal injuries received by the plaintiff, who was struck by a train operated by the defendant and thrown from his wagon. There was testimony tending to prove that the plaintiff was traveling along a public highway within the corporate limits of the city of New Bern, where the highway crossed the track at an acute angle, both the plaintiff and the train going in the same relative direction; that no signal for the crossing was given, either by bell or whistle; that the plaintiff stopped, looked and listened and heard nothing. In view of this evidence, both the defendant's motion to non-suit was properly refused, as were also the prayers for the direction of the verdict. There was conflicting evidence, but any such conflict must be reconciled or determined by the jury alone, the constitutional triers of fact. All that this Court can say is that, taking the evidence of the plaintiff as true, and construing all the evidence in the light most favorable to the plaintiff, there was more than a scintilla of evidence tending to prove his contention. *Printing Co. v. Raleigh,* 126 N. C., 516; *Mfg. Co. v. Railroad,* 128, N. C., 280; 83 Am. St. Rep., 675; *Boggan v. Railroad Co.,* 129 N. C., 154; 55 L. R. A., 418; *Gordon v. Railroad,* 132 N. C., 565.

It is well settled by the repeated adjudications of this Court that the "failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross," is at least *evidence* of negligence. *Hinkle v. Railroad Co.,* 109 N. C., 472; 26 Am. St. Rep., 581; *Russell v. R. Co.,* 118 N. C., 1098; *Fulp v. R. Co.,* 120 N. C., 525; *Norton v. Railroad,* 122 N. C., 910; *Powell v. Railroad,* 125 N. C., 370; *Edwards v. Railroad,*

132 N. C., 99. The engineer is not obliged to do both, but must do one or the other, as circumstances may require. For instance, in going through a city at a slow rate of speed, it would be sufficient to ring the bell, especially if blowing the whistle were forbidden by ordinance. On the contrary, in running through the country at a high rate of speed, where the ringing of the bell could not be heard at a sufficient distance to be of any practical benefit, ordinary prudence would seem to require the whistle to be blown. The object of the law is not to impose unnecessary burdens upon the engineer, but simply to require such notice of the approaching train as will enable travelers upon the public highway to cross the track in reasonable safety—certainly without unnecessary danger.

In *Edwards v. Railroad,* 129 N. C., 78, this Court has said: "We think that the testimony of a witness that he did not hear either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It *tends* to prove that neither the whistle nor the bell were sounded; but whether it *does* prove it, is for them alone to decide." In the present instance the jury might well have inferred that a warning, intended exclusively for those crossing the track, would, if given, have been heard by one listening for it at the crossing. When the law requires a party to prove a negative, it must of necessity permit him to prove it by negative testimony.

His Honor charged the jury among other things as follows: "If you find that the defendant sounded the whistle and had the bell rung, and had the headlight lighted up, all for a reasonable distance before reaching the crossing, you should answer the first issue 'No.' (But the evidence shows that the plaintiff was injured in a collision with the defendant's locomotive, and if you find that the defendant did not give the signals or any of them, you should answer the first issue 'Yes.')" The defendant excepted to so much of the

above charge as is enclosed in parentheses. We think this exception should be sustained, inasmuch as his Honor made the liability of the defendant to depend entirely upon its negligence, regardless of the fact whether such negligence was the proximate cause of the injury. In the case at bar the first issue was as follows: "Did the defendant negligently and carelessly run its engine against plaintiff and injure him as alleged in the complaint?" This question has been directly decided in *Edwards v. Railroad*, 129 N. C., 79, where this Court says, on page 81: "His Honor had previously charged as follows: 'If the jury find that the defendant's train approached the crossing in question without sounding the whistle and without ringing the bell, and struck and killed the plaintiff's intestate, then the jury are instructed that the defendant was guilty of negligence and you will answer the first issue "Yes."' This instruction was erroneous, because, the killing being admitted, it made the answer to the first issue depend entirely upon the failure to sound the whistle or ring the bell. If the issue had been simply as to the negligence of the defendant, this instruction would have been correct, but such was not the issue. It was as follows: 'Was the plaintiff's intestate killed by the negligence of the defendant?' This issue involved two propositions: first, the existence of such negligence; and, secondly, its relation to the injury. The negligence of the defendant, no matter how great, would not of itself have rendered it liable in damages unless it had contributed to the death of the plaintiff's intestate; while, on the other hand, the mere killing would not have been actionable unless caused by some unlawful act or the negligence or wilful omission of some legal duty on the part of the defendant." See also *Curtis v. Railroad*, 130 N. C., 437.

For this error in the charge there must be a

New trial.

PERKINS v. BRINKLEY.

(Filed September 29, 1903.)

1. WIDOW—*Year's Support—Executors and Administrators—Wills—The Code, secs. 2108, 2116.*

Where a widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance, such action is not maintainable.

2. WIDOW—*Year's Support—Executors and Administrators—Wills—Contracts—Ante-nuptial—The Code, sec. 2116.*

A widow is barred from recovering a year's support by an ante-nuptial contract relinquishing all claim to any property of her husband.

ACTION by Mary E. Perkins against Abram Brinkley and others, heard by Judge *Fred. Moore* at March Term, 1903, of the Superior Court of HALIFAX County. From a judgment for the defendant the plaintiff appealed.

Pittman & Kerr, for the plaintiff.
Thos. N. Hill, for the defendant.

CLARK, C. J. This is a proceeding for year's provision, begun 1st January, 1902, by the plaintiff, widow of W. M. Perkins, who died 2d January, 1901, leaving a will which was probated 11th January, 1901. The plaintiff did not dissent from the will till 11th January, 1902, being after this proceeding was instituted.

The allowance of year's provision is in derogation of the disposition of property by a will, when there is one, and therefore can only be granted in such case, when the will has been set aside as to the widow, by her dissent. The Code, sec. 2116, allows year's support only to the "widow of an

intestate, or of a testator from whose will she has dissented." This action, therefore, cannot be maintained, because at the time it was begun the plaintiff had not filed her dissent, and for the further reason that she had no right to dissent after the lapse of "six months after the probate" of the will. The Code, sec. 2108. By acquiescing six months in the disposition of the property by the will, the widow loses any right to disturb it by having any part appropriated for her benefit, and the executor is authorized absolutely to proceed to execute it, free from any claim from her. In *Cook v. Sexton,* 79 N. C., 305, *Rodman, J.,* enforcing forfeiture of the right by failure to comply with the further requirement that the application for year's support shall be made "within one year after the death of her husband," The Code, sections 2120 and 2128, says: "There must be some term of time applicable to the claim of every right within which it must be sued for. The policy of the law will not permit any demand to exist in perpetuity or indefinitely, unless legally asserted."

Even if the right to assert this claim had not been barred by the plaintiff's failure to dissent from her husband's will within the period allowed by law, she is barred by the following provision in a contract, entered into between her and her future husband, 25th January, 1893, in contemplation of marriage. In that contract W. M. Perkins conveyed to a trustee for the plaintiff's benefit 500 acres of land, and she agreed that she would not "claim for herself or through any other person any right, title or interest in any property now owned or which may hereafter be owned or become in possession of, by the said party of the first part, and hereby relinquishes all right of dower by virtue of said marriage to or in the estate of the said W. M. Perkins."

In *Murphy v. Avery,* 18 N. C., 25, the widow had, in her ante-nuptial contract, covenanted that she would not "set up any claim to the real or personal estate," and released all

"interest, claim or demand to any part of the estate, inheritance, dower lands or any other property, or to any distributive share"; and it was held that this barred all claim for year's allowance. In *Cauley v. Lawson,* 58 N. C., 132, the ante-nuptial contract provided that the intended wife "should not claim, have power to hold or retain any part or particle of the above property any longer than the above named parties shall live together"; and it was held that when she became a widow she was "precluded from dower, distributive share or year's provision in her husband's estate." This case is cited and approved in *Brooks v. Austin,* 95 N. C., 474.

The use of the words in the second clause in the contract in this case, "hereby relinquishes all right of dower," only emphasizes that matter, and does not narrow the broad words already used, "will not claim *any* right, title or interest in *any* property," by restricting them to embrace only the dower right. A case almost exactly on all-fours is *Hooks v. Lee,* 42 N. C., 83, at p. 93, in which the opinion by *Pearson, J.*, is affirmed on the rehearing, 43 N. C., 157, by *Ruffin, C. J.* In that case it was the husband who, by the terms of the ante-nuptial contract, was deprived of all participation in his deceased wife's estate. So, in every aspect, the judgment dismissing the action upon the facts agreed must be

Affirmed.

MONTGOMERY, J., did not sit on the hearing of this case.

MARKS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed September 29, 1903.)

1. CONTRIBUTORY NEGLIGENCE—*Negligence—Railroads—Evidence.*

It is contributory negligence for an epileptic to walk on a railroad track.

2. NEGLIGENCE — *Evidence — Sufficiency of Evidence — Last Clear Chance—Personal Injuries.*

In this action for personal injuries the evidence is sufficient to sustain a finding that the engineer, by the exercise of due care and prudence, could have prevented the injury, notwithstanding the negligence of the plaintiff.

ACTION by George Marks against the Atlantic Coast Line Railroad Company, heard by Judge *Fred. Moore* and a jury, at June Term, 1903, of the Superior Court of HALIFAX County. From a judgment for the plaintiff the defendant appealed.

Claude Kitchin, E. L. Travis and *W. E. Daniel,* for the plaintiff.

Thomas N. Hill and *Day & Bell,* for the defendant.

MONTGOMERY, J. This action was commenced by the plaintiff to recover damages against the defendant on account of personal injuries suffered by him through the alleged negligence of the defendant. The plaintiff was afflicted with epilepsy, and while walking upon the defendant's track, near Tillery in Halifax County, fell in a fit. The evidence of B. L. Turrentine, who was engineer on the occasion, was, in substance, that when he first saw what turned out to be the plaintiff, between four and five hundred yards off, he could not tell what it was, but at the distance of three hundred *yards* he

saw it was a man, and he commenced sounding the whistle and kept it up until the collision; that the plaintiff was sitting on the end of the cross-ties with his head down on his crossed arms; that as soon as he blew the whistle the plaintiff looked around at the engine as if in full possession of himself, and as if he would get out of the way; that he did not know how far he was from plaintiff when he became uneasy for fear that plaintiff would not get off, but he put on the brakes when he was about fifty yards off; that his engine and cars were properly equipped and he could have stopped the train within the space of a hundred yards. A statement in writing, made by the witness to the defendant company at the time of the plaintiff's injury, was introduced as evidence, the substance of which is as follows: That he could not make out what the plaintiff was when he first saw him, but in coming at three hundred *feet* he saw that it was a man; that before he got within three hundred feet of him "he was so doubled up and in such position that I could not see exactly what it was. As soon as I saw that it was a man I commenced blowing (blew the long station blow) and kept blowing as I aproached him. I was expecting him to get off every second. As the engine approached him and when about a hundred *feet* from him he turned his head and looked at the engine approaching. He said the track was straight and it was about 3:15 P. M. There was evidence going to show that a man could be seen on the track for a mile or more from where the engineer was when he first saw the plaintiff, that the track was straight and the view unobstructed.

The defendant objected to his Honor's submitting the second issue on contributory negligence, but, for reasons that will be hereafter pointed out, that issue was properly submitted. There were six exceptions to the admission of evidence, none of which can be sustained. The other exceptions, thirty in number, were for failure to give instructions re-

quested by the defendant, and to those given by his Honor in his charge.

It seems to us that the charge on the question of damages was sufficient in law and clearly to be understood by the jury. The others, though numerous, all revolve around one pivotal point. The varying aspects in which the contentions of the defendant are presented concern the position of the plaintiff on the track, and the consequent responsibility of the defendant in reference thereto. The jury had a right to consider, and doubtless did consider, the evidence given in on the stand by the witness Turrentine, and also his written statement made to the company shortly after the plaintiff was injured. If they believed his evidence on the stand, they could, under the instructions of his Honor, have answered the first issue as to the negligence of the defendant "No." If, however, they believed what he had said in his written statement to the defendant company, they were compelled, under all the evidence in the case, to find that the witness (engineer) failed to keep a proper lookout, or that if he did, he saw the plaintiff in an apparently helpless condition and failed to use the appliances which he had to prevent his injury, and to find the first issue in the affirmative. If the plaintiff was seen by the engineer sitting on the end of the cross-ties, in an upright position and apparently in his senses, the engineer had a right to presume, up to the last moment, that he would use his senses, keep a watchout for the train and get off the track; or, if the plaintiff had been seen by the engineer sitting on the end of the cross-ties with his face in his hands and his arms resting on his knees, and at a distance sufficient for the engineer to have checked his train and prevented the injury of the plaintiff, if he was really in a helpless condition, and upon the engineer sounding the whistle the plaintiff raised his head up upon hearing the whistle and looked straight at the engine continuously up to the time of the accident, then the engineer had a

right to presume that the plaintiff was in possession of his senses and would get off the track. *Upton v. Railroad,* 128 N. C., 173.

The second issue as to the contributory negligence of the plaintiff was properly answered in the affirmative. The plaintiff was an epileptic and the railroad track was not a proper place for him to have occupied.

The jury answered the third issue as to whether the defendant could have prevented the injury by the exercise of due care and prudence, notwithstanding the negligence of the plaintiff, in the affirmative, and there was evidence upon which they could have made that finding.

The instructions asked by the plaintiff proceeded upon the view that the defendant was upon the track in a natural position and apparently aware of the nature of his position and of the peril he was in.

There was evidence to the contrary. His Honor in the charge covered fully every legal phase of the case in connection with the evidence, and we see no error in it.

No error.

ALBEMARLE STEAM NAVIGATION COMPANY v. WORRELL.

(Filed September 29, 1903.)

1. PARTITION—*Jury—Waiver—Trial.*

Where the defendant in a partition proceeding fails to ask for a jury trial until after the clerk has ordered partition, he thereby waives the right thereto.

2. PARTITION—*Appeal.*

The ruling of the trial court affirming the clerk in ordering actual partition of land is not reviewable.

3. PARTITION—*Appeal—Orders—Interlocutory Orders.*

An order appointing commissioners in a partition proceeding is interlocutory, and an appeal therefrom is premature.

ACTION by the Albemarle Steam Navigation Company against M. E. Worrell and wife, heard by Judge *Fred. Moore,* at April Term, 1903, of the Superior Court of HERTFORD County. From a judgment ordering partition the defendants appealed.

Winborne & Lawrence, for the plaintiff.
David C. Barnes, for the defendants.

CLARK, C. J. The plaintiff, owning an undivided one-fourth interest in the premises, filed a petition for actual partition by metes and bounds. The defendants, owning the other three-fourths, alleged that an actual partition would be injurious, and asked for a sale. The Clerk, upon the hearing, adjudged that an actual partition can be made without injury to either party, and that a sale would be injurious to the plaintiff. On appeal this was affirmed, and the defendants again appealed.

If the defendants had been entitled to a jury trial as to "satisfactory proof" moving the Court to order a sale, which it is not necessary to consider in this case, they waived it by not asking for it till after the Clerk had made his decision. *Ledbetter v. Pinner*, 120 N. C., 455; *Railroad v. Parker*, 105 N. C., 246, and cases cited.

No appeal lay, first, because the ruling by the Judge affirming the Clerk in ordering actual partition was not reviewable, and for the further reason that, had it been, the appeal from an order appointing commissioners is interlocutory, and the appeal is premature. *Tel. Co. v. Railroad*, 83 N. C., 420; *Hendrix v. Railroad*, 98 N. C., 431, and cases cited. For this reason we do not notice the exception that the Court directed that the eastern one-fourth in value be allotted to the plaintiff with an alleyway. *Ritchey v. Welch*, 149 Ind., 214; 40 L. R. A., 105. The defendants' strenuous objection is to actual partition instead of a sale, but it may be that since there must be actual partition the defendants may be content with the allotment when made. At any rate, they should merely note their exception to the order, giving their grounds therefor, and such matters and all other exceptions will come up on appeal from the final order, should the defendants be dissatisfied therewith.

Appeal dismissed.

SIMPSON v. ENFIELD LUMBER COMPANY.

(Filed September 29, 1903.)

1. RAILROADS—*Negligence—Logs and Logging.*

A company operating a private railroad constructed for the purpose of removing timber conveyed to it is liable to the owner of the land for damages to his timber from fires caused by sparks from its engines igniting combustible material negligently permitted to accumulate on its right of way, to the same extent as a public railroad company.

2. PLEADINGS—*Amendments.*

A complaint stating that damage by fire was caused by the careless and negligent failure to provide the engine with spark-arresters, may be amended by alleging the negligence to be that combustible matter was allowed to accumulate on the right of way.

3. EVIDENCE—*Sufficiency of Evidence—Negligence.*

In an action for damages by fire, evidence that combustible matter was allowed to remain on the right of way of a private railroad, and that a fire was burning on the right of way soon after a train had passed, is sufficient to submit to the jury on the question of the negligence of the defendant.

MONTGOMERY, J., dissenting.

On petition for rehearing. See former opinion, 131 N. C., 518.

E. L. Travis and *H. G. Connor, Jr.*, for the petitioner.
Thomas N. Hill and *Day & Bell*, in opposition.

WALKER, J. This is a petition to rehear the above entitled case, which was decided at August Term, 1902, and is reported in 131 N. C., 518. This Court then held that the motion to non-suit should have been granted, as the defendant,

to whom the plaintiff had sold certain timber on his land with the right to cut the same and to build a railroad on the land for the purpose of removing it, was not liable to the plaintiff for any damage caused by a fire communicated by its engine, if properly equipped and operated, to combustible material negligently permitted to accumulate on or along its track and thence to the plaintiff's timber, which was destroyed by fire. In *Craft v. Timber Co.*, 132 N. C., 151, we had occasion to again consider the principle upon which the former decision in this case was based, and we held, overruling the case now under consideration, that upon such a state of facts as above set forth the defendant is liable, and we still adhere to the latter decision. We deem it sufficient, therefore, merely to refer to the case of *Craft v. Timber Co., supra,* for the reasons upon which we rely in this case to sustain the ruling that the defendant is liable, if, as found by the jury, it negligently permitted inflammable material to accumulate on or along its road-bed, which was set on fire by sparks or burning coals dropped from its engine, the fire being thence communicated to the plaintiff's timber, which was destroyed.

Having thus decided with respect to the defendant's general liability, it follows that the petition to rehear must be allowed, the former decision reversed and the defendant's exception to the refusal of the Court below to dismiss the action overruled. It then becomes necessary to consider the questions raised by the defendant's other exceptions.

The action was brought to recover damages for negligently burning timber on the plaintiff's land. It appears that on the 6th day of April, 1900, the plaintiff sold to the defendant all the timber of a certain size, when cut, on his tract of land and executed a deed therefor, granting to the defendant the right to "construct, maintain and use such roads, tramways, railways, etc., as it may deem necessary for cutting and removing said timber." The defendant, under this deed,

entered upon the land, constructed and used certain railways, and cut and removed the timber and hauled the same away over the said railways, using as a motive power a steam railway engine. On the 14th day of September, 1900, after the defendant had cut and removed all of the timber which it had bought, a fire destroyed the remainder of the standing and growing timber on the land, the plaintiff alleging that this fire was caused by the negligence of the defendant in allowing rubbish and combustible material to remain on its road-bed while it was operating its steam engine over the same.

The plaintiff in his original complaint alleged that the burning of the timber was caused by "the negligence of the defendant's agents and servants or by reason of the defective construction of its engines" which it operated on its railway. Afterwards the plaintiff asked and obtained leave to amend his complaint as follows: "That on or about the 14th day of September, 1900, the defendant did negligently and carelessly permit fire to be communicated from its engine, which was being operated over and upon said land for the purpose of removing the pine timber purchased as aforesaid, to the grass, weeds, straw and other dry and combustible matter, which the defendant had negligently allowed to grow, remain and accumulate upon and along its said track and right of way through said land, which spread and burned over the said land of the plaintiff, destroying large quantities of oak timber, fire-wood and undergrowth thereon, to the plaintiff's damage one thousand dollars; that at said time, as the plaintiff is informed and believes, the defendant carelessly and negligently failed to provide its engine with proper spark-arresters and other proper appliances to prevent the escape of sparks, and thus did negligently and carelessly set fire to said land and caused the plaintiff's damages as above set forth."

The defendant in apt time objected to the allowance of

this amendment; the objection was overruled and the defendant excepted.

We do not see why the amendment was not proper. It is contended by the defendant that by it a new cause of action was inserted in the complaint, which was a departure from that originally stated. The cause of action was the negligent burning and the damage resulting therefrom, and it was allowable for the plaintiff to allege different acts of negligence, or that the negligence was committed in different ways. The general scope and purpose of this action, or what is sometimes called the gravamen or the grievance or injury specially complained of, were not changed by the amendment. It can make no difference with respect to the plaintiff's right to recover whether the burning was caused by a defective engine or by setting on fire combustible material carelessly left by the defendant on its right-of-way. Amendments which only amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged or fortified in varying forms to meet the different aspects in which the pleader may anticipate its disclosure by the evidence. 1 Enc. Pl. and Pr., 557-562. It has been declared to be a fair test in determining whether a new cause of action is alleged in an amendment to inquire whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint, *Ibid.*, 556; or whether the amendment could have been cumulated with the original allegation. *Richardson v. Fenner,* 10 La. Ann., 599. Under either test, if applied to this case, the amendment was properly allowed. In suits founded on negligence, allegations of fact tending to establish the same general acts of negligence may properly be added by amendment. 1 Enc. Pl. and Pr., 563; *Railroad v. Kitchins,* 83 Ga., 83. An amendment can be allowed under our law when

it does not substantially change the claim or defense, the Code, sec. 273, and the statement of additional grounds of negligence is not a new cause of action or a substantial change of the plaintiff's claim. *Kuhns v. Railroad,* 76 Iowa, 60; *Davis v. Hill,* 43 N. H., 329; *Railroad v. Salmon,* 14 Kan., 512; *Smith v. Bogenschutz,* (Ky.), 19 S. W. Rep., 667; *Nash v. Adams,* 24 Conn., 33; *Carmichael v. Dollan,* 25 Neb., 335; *Railroad v. Hendrix,* 41 Ind., 49; *Chapman v. Nobleboro,* 76 Me., 427. The amendments allowed in the cases just cited were not unlike the one which was made in this case. In the case of *Smith v. Bogenschutz, supra,* it was held that a complaint, which alleged that a certain injury caused by the overflow of molten iron from a ladle in which it was being carried was due to the jostling of the carriers in a narrow passway, could be amended so as to allege that the overflow was due to a defect in the ladle without introducing any different cause of action. We do not see how our case can be distinguished from *Smith v. Bogenschutz,* which was well considered.

The case of *King v. Dudley,* 113 N. C., 167, seems to be directly in point. There, the plaintiff asserted title to a crop as lessee of a receiver, and, after the evidence or a portion of it had been introduced, she was permitted to amend her complaint by alleging that the crop was grown on land of her deceased husband, which was cultivated by her in lieu of her dower, and that the crop belonged to her. The Court held that the amendment was properly allowed, as it did not set up a cause of action wholly different from that alleged in the original complaint or change the subject matter of the action, though it did state a title entirely different from the one alleged in the original complaint. The cause of action was for the recovery of the crop, and it could make no difference how she claimed it, provided she established a good title. We think, therefore, that the amendment was properly allowed.

The defendant at the close of the plaintiff's testimony moved to dismiss the action or for judgment as in case of non-suit, upon the ground that there was no evidence of negligence, and, the motion being overruled, the defendant introduced testimony. At the close of all the testimony, the defendant renewed the motion to dismiss upon the same ground, and also requested the Court to charge the jury that if they believed the evidence the burning of the timber was not caused by the negligence of the defendant, and the jury should, therefore, answer the first issue "No." The motion to dismiss having been denied, and the prayer for instruction refused, the defendant excepted to each ruling. These two exceptions present the question whether there was sufficient evidence to be submitted to the jury upon the question of negligence. The plaintiff at the trial introduced as a witness Candace Williams, who testified as follows: "My house is about 200 yards from the defendant's track, and the track can be seen from my house. The timber was cut down and just place enough left for the train to go along, and then they put down the ties and ran the track just any way. There was nothing in the world taken away. They just put the trees and brush out of the way so the train could go along. They never raked out anything; just laid the cross-ties right on top of it, all along through the woods. The fire was Wednesday after the second Sunday in September. It was the last day the three trains were in there. In the evening when the train went out the last time, the fire came. There was a fire just a little below my house. I saw it was coming out and went out to pull the fence down. I knew it would burn me up. The train was then about against my house, going on out. I saw the smoke right across the woods when the train came out. Two smokes rose up right behind the train, right at the track, where the train came out from. Just as the train came out, there were two little smokes right up behind the train, and I

spoke to my little girl and said, 'yonder are two smokes right now from the train.' They rose up behind the train and came right from the track so that they could not cross it the next morning." On cross-examination she stated: "It was right at the railroad. I saw the smoke when it rose right up and the railroad was right there, and it looked like the fire was right there, most by the ties. There were some fires in there, but there didn't come any fire in there before the train came in there. When the train ran along, there was a fire all along the railroad."

It would be useless to state all the testimony of the witnesses. The witness Candace Williams testified at length on her direct examination as to how the fire originated, and she was subjected to a long and rigid cross-examination. It is not our province to pass upon the credibility of this witness. The jury, it seems, believed her, and we can only say, upon the foregoing statement of her testimony, that there was at least some evidence tending to show that the burning of the plaintiff's timber was caused by the defendant's negligence in the manner set forth in the complaint.

The Court has long since adopted the rule that "where the plaintiff shows damage resulting from the defendant's act, which act, with the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless." *Aycock v. Railroad,* 89 N. C., 321; *Lawton v. Giles,* 90 N. C., 374; *Piggot v. Railroad,* 54 E. C. L., 228; *Craft v. Timber Co.,* 132 N. C., 151; *Ins. Co. v. Railroad,* 132 N. C., 75. In *Aycock v. Railroad,* 89 N. C., 329, the Court, through *Smith, C. J.,* says: "A numerous array of cases are cited in the note (2 A. and E. R. R. Cases, 271) in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where

only the injury is shown, in the case of fire from emitted sparks. While the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this State, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not. And it is but just that he should be allowed to say to the company, you have burned my property, and, if you are not in default, show it and escape responsibility."

We have considered at length the two exceptions that were pressed in argument before us. Other exceptions were taken by the defendant, but after a most careful examination of them we think they are without merit.

The former judgment of this Court is reversed and the judgment below is affirmed.

Petition allowed and judgment below affirmed.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

MONTGOMERY, J., dissenting.

DOUGLAS, J., concurring. I concur in the opinion of the Court, but as my reasons are fully set out in my dissenting opinion filed at the first hearing of this case, reported in 131 N. C., 523, it is needless to repeat them. The issues of fact were properly left to the jury, as there was evidence tending to support the plaintiff's contentions.

PARKER v. TAYLOR.

(Filed September 29, 1903.)

BOUNDARIES—*Processioning—Trespass—Damages—Estoppel—Former Adjudication—Acts 1893, ch. 22—The Code, secs. 1924-1931.*

In a special proceeding to determine boundary, where the defendant raises no issue of title and takes no appeal, the judgment of the clerk determining the boundary is *res judicata* in a subsequent action between the parties for cutting timber beyond the boundary so established.

ACTION by John C. Parker against John R. Taylor and others, heard by Judge *M. H. Justice* and a jury, at Spring Term, 1903, of the Superior Court of GATES County. From a judgment for the defendants the plaintiff appealed.

W. M. Bond, for the plaintiff.
L. L. Smith, for the defendant.

CLARK, C. J. When the occupants of adjoining tracts differ as to the location of the boundary line between them, but in no wise question the title of each other to their respective tracts, it would be an evident hardship to drive one of them to an action of ejectment in the Superior Court, and to establish a chain of title which the other does not dispute. There should be, in such cases, some cheaper and more speedy proceeding to establish the boundary line between them. The old "Processioning Act" originally passed 1723 (chapter 48 of The Code), having proved defective for that purpose, the General Assembly repealed it and enacted in its stead chapter 22, Laws 1893, which provides that "the owner of land, any of whose boundary lines are in dispute, may establish said line or lines by special proceeding" in the county where the land or any part thereof is situated. The act provides for

the method of procedure, and that if answer is filed denying the location of the boundary, a survey shall be ordered, and, after hearing the cause, the Clerk may give "judgment determining the location" of said boundary line, with right to either party to appeal to the Superior Court at term for a trial by a jury *de novo* of the issue. This last provision cures the objection urged against the former statute. *Britt v. Benton,* 79 N. C., 177.

In a special proceeding for partition, if the plea of sole seizin is set up, the issue of title is transferred to the Court at term for trial, and the action becomes substantially an action of ejectment. *Purvis v. Wilson,* 50 N. C., 22; 69 Am. Dec., 773; *Alexander v. Gibbon,* 118 N. C., 796; 54 Am. St. Rep., 757; *Honeycutt v. Brooks,* 116 N. C., 788; *Bullock v. Bullock,* 131 N. C., 29. In this special proceeding to determine boundary, whether if the defendant by his answer raises an issue of title, the cause should in the same manner be transmitted to the Court at term, thenceforward to be proceeded in as if originally brought to determine the issue of title as in action of ejectment, *In re Anderson,* 132 N. C., 247; *Roseman v. Roseman,* 127 N. C., 494, is not a matter before us. But when the answer raises only an issue of boundary, the judgment of the Clerk is a final determination of that issue, unless appealed from, in which case the verdict of the jury and judgment would be final as to the boundary. The statute provides that "occupation of land shall constitute sufficient ownership for the purposes of this act." The sole purpose is to locate the boundary between adjoining proprietors who do not question each other's title to their respective tracts, for if an issue as to title is raised by the answer, the cause would be transferred, as already said, to the Court at term.

This present action is for trespass in cutting timber beyond a dividing line which had thus been determined in a

special proceeding formerly had between the plaintiff herein (defendant in that proceeding) and the parties under whom the defendants claim (plaintiffs in such former proceeding), and the defendants plead said judgment as an estoppel. The record of the former proceeding and judgment therein was pleaded and shown in evidence, and the plaintiff admitted that according to the line as located by said judgment the *locus in quo* was on the defendant's side thereof. His Honor thereupon intimated an opinion that the plaintiff could not recover, in deference to which he took a nonsuit and appealed.

There was no error. The line was located by a judgment to which the plaintiff and those under whom these defendants claim were parties. The plaintiff, who was defendant in the former action, did not therein raise any issue as to title and have it tried as he might have done, and the adjudication as to this being the true boundary is *res judicata.*

The judgment of the Clerk "determining the location" of the line is authorized by the statute, and is conclusive of that fact upon parties and privies to said action. *Williams v. Hughes,* 124 N. C., 3; *Midgett v. Midgett,* 129 N. C., 21.

No error.

HARPER v. COMMISSIONERS OF NEW HANOVER COUNTY.

(Filed October 6, 1903.)

1. TAXATION—*Fences—Stock Law—Acts 1903, ch. 56—Acts 1903, ch. 554—Const., Art. VII, sec. 9—Acts 1899, ch. 290.*

Acts 1903, ch. 554, being an act supplemental to Acts 1903, ch. 56, repealing the stock law in a township in New Hanover county, and providing that the commissioners of the county shall fence where necessary and defray the expenses from the general fund in the county treasury, and thereafter levy on all taxable real estate in the county a tax sufficient to replace the amount drawn out of the general fund, if regarded as authorizing a tax, violates the Constitution, Art. VII, sec. 9, directing that "all taxes levied by any county * * * shall be uniform and *ad valorem* upon all property" in the county.

2. TAXATION—*Fences—Stock Law—Assessments—Acts 1903, ch. 554.*

Acts 1903, ch. 554, if regarded as an act authorizing the imposition of special assessments, is invalid, because it authorizes assessments on the real estate of the entire county, including the real estate of the township withdrawn from the benefits of the stock law, and which would receive no benefits from the fences erected by the commissioners.

3. TAXATION—*Fences—Stock Law—Assessments—Acts 1903, ch. 554.*

Acts 1903, ch. 554, cannot be held valid so far as it authorizes the commissioners to erect fences when necessary and to draw out of the general fund of the county money to pay for the same, and invalid so far as it authorizes the imposition of a tax or assessment to replace the money so used, for the court cannot presume that the legislature would have directed the expense of building the fences to be taken out of the general fund without also making provision for replacing the money withdrawn.

4. TAXATION — *Fences—Stock Law—Assessments—County Commissioners—The Code, sec. 2824.*

The Code, sec. 2824, providing that for the purpose of building stock law fences the county commissioners may levy a special assessment on all taxable real estate "within the county, township or

district which may adopt the stock law," does not authorize the imposition of an assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners.

ACTION by John W. Harper and others against the Board of Commissioners of New Hanover County, heard by Judge *R. B. Peebles,* at Chambers, in Wilmington, N. C., during May Term, 1903, of the Superior Court of NEW HANOVER County. From a judgment for the plaintiffs the defendants appealed.

E. K. Bryan, for the plaintiffs.
Rountree & Carr and *J. D. Bellamy,* for the defendant.

CONNOR, J. By the provisions of chapter 290 of the Public Laws of 1899, the whole of New Hanover County, "except that portion which lies between the Cape Fear river and the Northeast Cape Fear river," was placed under the "stock law" and the Commissioners directed to build all necessary fences, etc. By chapter 56 of the Laws of 1903, entitled "An act to repeal the stock law in Federal Point township in New Hanover County," ratified January 29, 1903, it was enacted that from and after June 1, 1903, the act of 1899 shall not apply to that portion of New Hanover described in said act." Section 2 of this act directs the Commissioners of said county to have erected a fence where necessary, "and for defraying the expenses of constructing said fence and gates the said board may draw upon the county treasurer of said county of New Hanover for a sum sufficient therefor out of the general fund of said county, and may thereafter levy on all real estate taxable by State and county in said territory so fenced out and collect a tax sufficient to replace the amount

so drawn out of the general fund," etc. In the passage of this act the provisions of section 14, Art. II of the Constitution were complied with, but the proposition to make the change in the law and levy the assessment was not submitted to the voters of the territory affected or of the county of New Hanover. On the 29th January, 1903, an act was passed by the Legislature entitled "An act supplemental to an act entitled an act to repeal the stock law in Federal Point township, New Hanover county." By this act the words "territory so fenced out" are stricken out and the word "county" inserted in lieu thereof, thus making the original act to impose upon the County Commissioners the duty of levying a tax on all *real property* in said county. This last named act was not passed in accordance with the requirements of section 14, Article II of the Constitution. The plaintiffs are citizens and tax-payers of the county of New Hanover, and owners of land in Federal Point township. They allege, and it is admitted by the answer that in accordance with the provisions of said act the defendants, Commissioners, "are about to build the said fence, and have actually surveyed out the lines, according to the said act, and have advertised for bids for building said fence, as authorized by said act, and will, unless restrained by this honorable Court, build the said fence in accordance with the terms of said act, and levy the cost of the same against the real property situate in the territory wherein the said fence law is re-established by said act, and will proceed to collect the same," etc. Plaintiffs allege, also, "that they will receive no benefit whatever from the said act, but the said act only restores plaintiffs and other owners of real estate in the said territory their common law right of pasturage." To this allegation the defendants, Commissioners, say that they have no knowledge or information sufficient to form a belief, and are advised that they are immaterial to this action.

J. T. Burnett, upon his application, was permitted to come in and make himself a party defendant and thereupon files an answer to the complaint, admitting the material facts, but denying that the acts are void, and alleging that the construction of said fence is a necessary county expense which defendant county can erect with or without legislative enactment, and levy a tax within the constitutional limits sufficient to pay for the cost of the same. He also denies the allegation that plaintiffs will receive no benefit from the construction of said fence. He admits that the Commissioners have decided to assess the cost and expense of constructing the fence against the real property in the territory enclosed by the fence and not against the real property of the entire county, and that they will proceed to collect the tax on real property situated in said territory, and that they have surveyed the lines and advertised for bids, etc. The plaintiffs pray that the defendants may be enjoined from proceeding to erect the fence and to levy the assessment as they threaten to do. Upon the complaint a restraining order was issued, and upon the hearing before Judge Peebles the said order was continued to the hearing, and the defendants appealed.

If the enactment of January 29, 1903, cannot be sustained as an assessment, it is clear that it cannot be sustained as an authority to levy a tax, because it is not uniform, in that it authorizes the tax to be levied only upon the real estate in the territory, whereas the Constitution, Art. VII, sec. 9, directs that "all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution," and this Court held, in *Cobb v. Elizabeth City,* 75 N. C., 1, that "all taxes, therefore, must be levied as well on personal as on real property." Hence the question whether this (the building of fences) be a "necessary expense" within the meaning of section 4, Art. V of the Constitution, is not presented. But

the defendants say that the tax authorized to be levied is a special assessment and comes within the principle frequently announced by this Court in regard to assessments for local improvements. The principle upon which these assessments are sustained is thus stated by *Mr. Justice Dillon:* "A constitutional provision that taxation shall be equal and uniform throughout the State does not apply to local assessments upon private property to pay for local improvements." 2 Dillon Mun. Corp., sec. 617, cited in *Cain v. Commissioners,* 86 N. C., 8. In *Busbee v. Commissioners,* 93 N. C., 143, *Smith, C. J.,* says: "But these local assessments are not under all the restraints put upon the taxing power. They stand upon a different footing and rest upon the equitable and just consideration that lands rendered more valuable by the improvements ought to contribute to the expense of making the improvement, and that these expenses ought not to fall upon the entire body of the tax payers, as well those who are not benefited as those who are benefited. The advantage is to the land, and to the persons only as owners of the land." It would seem, therefore, that whatever validity, if any, the two acts referred to have, is by virtue of the principle announced in the case cited.

We are thus brought to a consideration of the question whether they can be sustained as local assessments. The theory upon which assessments of this character have been sustained by our Court is that a benefit clearly exceptive and plainly perceived must enure to the property upon which it is imposed. A review of the several decisions of this Court sustaining the assessments for the purpose of erecting fences around common territory within which live stock shall not be permitted to run at large will show that as the greater burden is thus removed from the land owner, he, as such, should bear the expense by which this result is brought about. The whole legislation upon this subject, which has in the past few

years been extended to a very large portion of the State, is based upon the theory that land owners are thereby relieved of the necessity of maintaining fences around their cultivated fields, and that the establishment of a common fence around the entire county or other territory is a benefit to such lands, in that it relieves the owners of this burden. The doctrine is thus stated by *Smith, C. J.*, in *Cain v. Commissioners, supra:* "The general law requires a sufficient fence to be built and kept up around all cultivated land to protect it from the depredations of stock, at a very great and unceasing expense, becoming the more onerous as the material used in its construction becomes scarcer and more costly. The enactment proposes to dispense with separate enclosures for each man's land, and substitute a common fence around the county boundary to protect all agricultural lands from the inroads of stock from abroad, and a fencing-in of stock owned within its limits. It creates a community of interest in upholding one barrier in place of separate and distinct barriers for each plantation, and thus in the common burden lessens the weight that each cultivator of the soil must otherwise individually bear. As the greater burden is thus removed from the landowner, he, as such, ought to bear the expense by which this result is brought about. The special interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This, and no more, is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land proprietor, as it is free from any constitutional impediments." It was in accordance with this principle that the Act of 1899 was passed, by which the benefits of the stock law were secured to the county of New Hanover. The legislation of 1903 is based upon an entirely different and contradictory theory. Certainly if the benefits of the stock law are withdrawn from the land owners of Federal Point township and they are thus required to maintain

individual fences around their separate parcels of land, it is difficult to see how they are benefited or their lands relieved of any burden by erecting a fence separating them from the other portions of the county. We concur with his Honor's view as set out in the judgment: "If it be true, as has been frequently held by our Supreme Court, that in changing from the old system of individual fences around cultivated fields to the new system of a common fence to protect the cultivated fields enclosed by the common fence, the lands within said fence receive a common benefit equal to or greater than the burden of keeping up said common fence, then it must necessarily follow that in abolishing the new system and restoring the old, so far as Federal Point township is concerned, no special benefits will result to the lands in Federal Point township to support the tax as an assessment. If the act is enforced, as the defendants are attempting to enforce it, the lands in Federal Point township will be taxed to build a fence to keep their stock from running on the other lands of New Hanover County, and also to keep up its individual fences around cultivated fields in said township." This would seem to be conclusive in the disposition of this cause.

In addition, however, to what we have said, the supplemental act, while it may be invalid as authorizing the imposition of a tax upon the people of the whole county, is certainly valid as withdrawing from the Commissioners the power to levy a tax within the territory so fenced out, leaving them without authority to levy any tax or assessment whatever to pay for building the fence. It is suggested, however, that if this be the result of the legislation, that the other portion of the act of January 29, 1903, may be valid and impose upon the Commissioners the duty of erecting the fence and paying for it out of the general fund. While it is well settled that an act may be valid in part and invalid in part, it is equally well settled that when it is manifest that the act contemplates

and provides for one general scheme or purpose, and the parts are so interdependent one upon the other that it cannot be supposed that the General Assembly would have enacted the law with the invalid portions eliminated, the valid portion will not be sustained. The principle is thus stated by *Chief Justice Shaw,* in 2 Gray, 84: "If the different parts are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." *Pollock v. Farmers Loan and Trust Co.,* 158 U. S., 601. We cannot suppose that the Legislature would have directed the expense of building this fence to be taken out of the general fund of the county and made no provision for replacing it by a special assessment imposed upon the lands, if any, that were benefited thereby. If this construction should be given the act, it is doubtful whether it could be sustained, under the decisions of this Court, as a necessary expense. The defendants suggest, however, that the tax must be sustained under the provisions of section 2824 of The Code. We concur with his Honor in holding that the purpose of this section is exactly opposite to that for which it is sought to be invoked. It is therein provided that "for the purpose of building stock-law fences the Board of Commissioners of the county may levy and collect a special assessment upon all real property taxable by the State and county within the county, township or district *which may adopt the stock law,* but no such assessment shall be greater than one-fourth of one per centum of the value of said property." The territory within which the proposed assessment is to be levied has not only not *adopted* but expressly *rejected* the stock law; hence such an assessment could not be sustained.

We are therefore of the opinion that his Honor correctly continued the injunction to the hearing.

Judgment affirmed.

CLARK, C. J., concurs on the ground:

1. That the authority conferred by the act of 29 January, 1903, to levy a tax upon the land owners of Federal Point Township to build the fence was repealed by the supplementary act.

2. That it cannot be levied upon the tax payers of the whole county, as required by the supplementary and repealing act, because it cannot be sustained as an assessment, there being no land relieved of a burden, and as an act "to impose a tax" is defective in not being laid on personalty as well as realty, because also it was not passed in the mode required by section 14, Art. II of the Constitution, and, besides, is further invalid, because, not being a "necessary county expense," the tax was not voted by the people. Const., Art. VII, sec. 7.

3. It cannot be levied under The Code, sec. 2824, for that authorizes an assessment upon realty in any territory adopting a stock law. This is an anti-stock law, and, besides, has not been adopted by any territory.

IN RE BURGWYN.

(Filed October 6, 1903.)

INTOXICATING LIQUORS — *Licenses—Statutes—Acts 1874-'75, ch. 255—Acts 1883, ch. 146—Acts 1900, ch. 17—Acts 1901, ch. 9—Acts 1903, ch. 233.*

Acts 1900, ch. 17, authorizing judges of the superior court to grant license to sell intoxicating liquors in a certain county, is repealed by acts 1901, ch. 9, sec. 76, giving exclusive right to grant license to the county commissioners.

APPLICATION by George P. Burgwyn for license to sell intoxicating liquors, heard by Judge *M. H. Justice* at August Term, 1903, of the Superior Court of NORTHAMPTON County. From a judgment refusing to grant the application the petitioner appealed.

Peebles & Harris and *Day & Bell,* for the applicant.

Gay & Midyette, F. D. Winston, F. H. Busbee & Son and *S. J. Calvert,* in opposition.

MONTGOMERY, J. Under the provisions of chapter 255 of the Acts of the General Assembly of 1874-'75 a prohibition of the sale of intoxicating liquor by the measure less than a quart was effected in Northampton County. At its session of 1883 the General Assembly enacted a law entitled "An act to regulate the sale of liquor in Northampton County." The limitations and conditions imposed by that statute upon the applicant to sell spirituous or malt liquors, wines or cordials in quantities less than a quart before a license therefor should be granted by the County Commissioners were different from those imposed by the general laws of the State on that subject, and they were also more numerous and stringent. The regulations concerning the sale of liquor after the license

might be obtained, as set out in the last-mentioned act, were in many respects the same as were prescribed in the general law. It was provided also in the last-mentioned act that all laws regulating or prohibiting the sale of liquor, in so far as they applied to the county of Northampton, were repealed. At its adjourned session of 1900 the Legislature enacted into law a bill entitled "An act to regulate the issuing of liquor license in Northampton County." Under that act jurisdiction and power to grant license were taken from the Board of County Commissioners and conferred exclusively upon the Judges of the Superior Courts while holding the courts for that county (an honor which we feel sure was not sought by any of the Judges).

At the August Term, 1903, of the Superior Court of Northampton County George P. Burgwyn made application for license to retail spirituous and malt liquors, wines and cordials in quantities less than a quart at his place of business, not in an incorporated town, in Northampton County, under the provisions of the two last above-mentioned acts. Upon the hearing of the petition his Honor was of the opinion that the Act of 1903, chapter 233, was applicable to Northampton County and repealed the Acts of 1883 and 1900, and that he had no power in law to grant the license. His Honor declined to hear the evidence and pass upon the application, upon the ground that he had no power in the matter. We concur with his Honor upon the disposition he made of the petition, but not for the reason assigned by him.

We are of the opinion that by chapter 9, section 76, of the Public Laws of 1901, the jurisdiction and power to grant license to retail spirituous and malt liquors in Northampton County were taken from the Judges of the Superior Courts (as we think, most properly) and given to the Board of County Commissioners.

Many changes, for the better, in reference to the manner in

which liquor license may be procured were made by section 76, chapter 9 of the Laws of 1901. Amongst them are provisions to the effect that every person, company or firm wishing to sell liquor by the retail is required, first, to advertise his intention of making such application by publishing a notice of such intention for thirty days next preceding the day on which the application shall be presented to the *Board of County Commissioners,* and proof of such publication, or posting at the court-house door in case there is no newspaper in the county, shall be proved to the satisfaction of the board before they shall consider the application. Any one who may consider himself aggrieved should the license be granted may contest the same before the commissioners. Every such application for a license to sell liquor shall be in writing, signed by the applicant and accompanied by the affidavit of six freeholders who are tax-payers and residents of the township in which the applicant proposes to do business, all of whom shall declare, upon oath, that the applicant is a proper person to sell spirituous, vinous or malt liquors, etc. Upon the filing of such application and affidavit the Board of County Commissioners may grant an order to the Sheriff to issue such license, *except in territory where the sale of liquor is prohibited by law.* There are other changes, but they need not be mentioned.

So it is seen that the law as written in chapter 9, section 76, of the Acts of 1901, applies to every person, company or firm in the State who may wish to sell liquors, and extends over every county, city, town and township in the State, except territory where the sale of liquor is prohibited by law. The sale of liquor is not prohibited by law in Northampton County, and if it had been intended that Northampton County should be excluded from the provisions of section 76 of chapter 9 of the Laws of 1901, the exception would have been named under the head of territory where the sale of liquor was regulated by special or local statute.

It is required, too, that the application be made to the *Board of Commissioners* of the counties, and that the license must be issued by them, when issued. The statutes of 1883 and 1900 conflict with section 76 of chapter 9 of the Acts of 1901 in the respects above pointed out, and the latter statute therefore repeals the former in the points of conflict.

It does not become necessary to discuss the question whether chapter 233 of the Laws of 1903 applies to the sale in Northampton County.

Affirmed.

DOUGLAS and WALKER, JJ., concur in result.

JOHNSTON v. CUTCHIN.

(Filed October 6, 1903.)

1. EXECUTORS AND ADMINISTRATORS — *Subrogation — Beneficiaries—Wills—Mortgages.*

Where the beneficiaries of a life policy allowed the proceeds thereof to be applied to the payment of a mortgage on decedent's realty, as directed by decedent's will, they were entitled to the funds in the hands of the executor of decedent as creditors by reason of the payment of their insurance money on the mortgage debt.

2. EXECUTORS AND ADMINISTRATORS—*Beneficiaries—Insurance—Wills—Payments.*

The beneficiary of a life policy, who was indebted to the estate of decedent in a greater amount than his share of the insurance money which he and the other beneficiaries allowed to be applied to the payment of a mortgage on decedent's realty, could not claim any part of the funds in the hands of the executor of decedent as creditor by reason of such payment.

3. ATTORNEY AND CLIENT—*Fees—Contracts—Damages.*

Where an attorney was employed by the heirs of a decedent under a contract that he should receive a certain portion of any sums which he might recover from the estate of the decedent, he was not entitled to anything when he recovered nothing for the heirs, though he may have been prevented by them from prosecuting their claim, his remedy being by an action for damages.

ACTION by W. H. Johnston, executor, against Margaret A. Cutchin and others, heard by Judge *George H. Brown* at March Term, 1903, of the Superior Court of EDGECOMBE County. From a judgment for the defendants the plaintiffs appealed.

W. H. Johnston, for the plaintiffs.

John L. Bridges, G. M. T. Fountain and *R. G. Allsbrook*, for the defendants.

MONTGOMERY, J. A judgment was rendered below upon a statement of facts agreed by the parties in a controversy without action under section 567 of The Code. Norfleet Cutchin, at the time of his death and the subsequent qualification of W. H. Johnston as his executor in 1889, was indebted in the sum of about three thousand dollars, incurred for the purchase of the land, secured by a deed of trust upon his tract of land known as the "Nathan Pippin place," and in various other amounts unsecured. Item 3 of the will of the testator, Norfleet Cutchin, is as follows: "3. The tenth item of the will of the said Norfleet Cutchin is in the following words, to-wit: 'I direct and provide that the proceeds of the policies of the Equitable Insurance Company which were issued for the benefit of my wife and children, except my son, B. E. Cutchin, shall be applied to the satisfaction of the debts contracted to enable me to purchase the tract of land known as the Nathan Pippen tract, which was conveyed to me by William M. Pippen as above stated. If my children, collectively or individually, elect to take such proceeds for their own use, and thus prevent the application of the same to said debts, I do in that event direct that their, his or her share be sold and applied to the payment of the note held by W. H. Johnston for the purchase of the Pippen place. In order to better identify said debt I hereby state that the principal thereof was originally $3,250, but has been reduced to $3,000, and that the bonds therefor were given by me to W. H. Johnston for money loaned me by him to enable me to pay for said land, and were dated on the first day of January, 1883.'"

The amount due on the policy of insurance was collected by W. H. Johnston as the agent of the testator's widow, M. A. Cutchin, and his sons, K. H. Cutchin, R. N. Cutchin and a married daughter, Mattie Lee Bobbitt. The whole amount was applied by Johnston towards the payment of the debt mentioned in the deed of trust on the Pippen tract of land

(leaving a balance due of nearly one thousand dollars on the debt), under the directions of a paper-writing in the following words: "We, the undersigned, to whom the proceeds of the policy on the life of Norfleet Cutchin, deceased, issued by the Equitable Life Assurance Society of the United States, are to be paid, have decided to apply our shares of same to the payment of the debts specified in the will of the said Norfleet Cutchin, as in the hands of W. H. Johnston, and direct said Johnston to apply the same, when collected, to the payment of said debts. July 6, 1889. (Signed) R. N. Cutchin, K. H. Cutchin, Mattie L. Bobbitt, Margaret A. Cutchin. Witnessed by Noah Lewis."

The amount applied belonging to Mrs. Bobbitt was $600, that of R. N. Cutchin $600 and that of K. H. Cutchin $513.25. The personal estate of the testator and the insurance money not having been sufficient to pay the debts of the testator, decrees were made by the Superior Court of Edgecombe County, upon the petition of the executor, for the sale of the land to pay debts. The purchase money for the land sales was paid and the report of the sales confirmed. The executor Johnston died on the 25th December, 1899, before he had filed his final account, and his executors, Caroline and Henry Johnston, qualified as exectuor of the will of Norfleet Cutchin. They have filed their final account as executors of Norfleet Cutchin, leaving a balance due by them to the estate of $1,481.15.

In October, 1893, K. H. Cutchin and R. N. Cutchin made a contract with W. A. Dunn as follows: "We agree to pay W. A. Dunn four-ninths of any and all sums that he may recover for us in any way from the estate of our father, Norfleet Cutchin, for any reason whatsoever, and authorize him to act as our attorney." In pursuance of that contract, W. A. Dunn as the attorney of K. H. and R. N. Cutchin in February, 1894, instituted an action in the Superior Court of

Edgecombe County against W. H. Johnston, executor, to recover from him the amount of their shares of the insurance money which he had applied to the payment of the Pippen debt and to be subrogated to his rights under the deed of trust. A judgment was entered against the plaintiffs in the Superior Court, and that judgment was affirmed by this Court at February Term, 1897 (120 N. C., 51). W. A. Dunn made himself a party to the proceedings to sell the land for the payment of debts, and set up his claim under his agreement with K. H. and R. N. Cutchin.

When this case was heard below "it was agreed and found as a fact by the Judge that K. H. and R. N. Cutchin did not now claim, as heretofore, to be subrogated to the rights of creditors in this action, but ask that the entire money be applied in discharge of the devises and legacies to their children under the will. The executor has paid for K. H. Cutchin to creditors, the testator being surety, a greater amount than his share of the insurance money. Upon the facts the Court rendered judgment:

"1. That K. H. Cutchin, R. N. Cutchin and M. L. Bobbitt are entitled to the funds admitted to be in the hands of the executor of Norfleet Cutchin as creditors, by reason of the payments made by them of their insurance money on the indebtedness of the testator, and that neither they nor their children are entitled to the same as devisees under the will.

"2. That K. H. Cutchin, being indebted to the estate of the testator in a greater amount than his share of the insurance money paid by him for the estate at the time it was paid, is not entitled to receive any of the funds in the hands of the executor.

3. That W. A. Dunn is entitled to four-ninths of such amounts as belong to R. N. Cutchin under this judgment."

The executors were directed to pay, first, the costs of the action, including the sum of $10, to be paid to James Pender,

the next friend of Mabel Cutchin, Mattie Lee Cutchin and Donnell Cutchin. Out of the funds now in their hands, which amounted to $1,485.25, and after the payment of the costs, they pay one-half of what remains to M. L. Bobbitt or her attorney, and four-ninths of the other half they pay to W. A. Dunn by virtue of the assignment made to him by R. N. Cutchin, and the remaining five-ninths they pay to R. N. Cutchin, and that upon the amounts specified the executors shall be fully discharged from further liability by reason of their dealings with the administration and settlement of the estate of Norfleet Cutchin.

From the judgment the executors and A. E. Bobbitt, guardian of his children, James Pender, next friend of Mabel Cutchin, Mattie Lee Cutchin, Donnell Cutchin, Nannie G. Cutchin, T. N. Cutchin and R. N. Cutchin appealed to this Court.

We are of the opinion that there is no error, except in that part of the judgment in which four-ninths of the recovery of R. N. Cutchin should be paid to W. A. Dunn. He was entitled under the law to no part of it. It appears from the statement of the facts that he did not make any recovery for his clients in the action he brought for them in 1894. The judgment of the Court below was against them, and that judgment was affirmed in this Court. He had no connection with the present action as attorney. In the event that he had made a recovery for his clients by judgment, by many respectable authorities, he would, under the agreement with K. H. and R. N. Cutchin, have been entitled to the judgment in his favor, such an agreement between attorney and client being held to be an equitable assignment. But the question does not arise in this case, and it is not necessary for us to decide it.

If K. H. and R. N. Cutchin prevented him from further prosecuting their demand and claim against the executors

after the failure of the first action, he may have his remedy against them by a civil action, but he can claim no lien upon the recovery as equitable assignee.

In the 11th section of the will the testator directed that out of the proceeds of the crop made on the land devised to the children of his son, K. H. Cutchin, a bale of cotton should be annually paid to his daughter, Mattie Lee Cutchin, during the life of his widow, and out of the crop made on the land devised to the children of R. N. Cutchin a bale of cotton should be paid annually during the life of his widow to Mattie Lee Cutchin.

In the agreed facts it was stated that $131.22 was due by the devisees of the Nathan Pippen and Bob Johnston tracts. His Honor below, in the judgment, held that Mrs. Bobbitt was not entitled to receive those amounts by virtue of item 11 of the will, on the ground that they were payable out of the crop alone, and, as we have said, there is no error in that ruling.

Modified and affirmed.

PURNELL v. PAGE.

(Filed October 15, 1903.)

1. TAXATION—*Income Tax—Federal Officers—Salaries and Fees.*

A state cannot tax the salary of a federal officer.

2. INJUNCTION—*Taxation.*

A tax payer may maintain an injunction to prevent the sale of his property under an illegal tax, or he may pay the tax under protest and sue to recover it.

ACTION by T. R. Purnell against M. W. Page, Sheriff of Wake County, heard by Judge *H. R. Bryan,* at July Term, 1903, of the Superior Court of WAKE County. From a judgment for the plaintiff the defendant appealed.

E. J. Best, W. H. Day and *F. H. Busbee & Son,* for the plaintiff.

Locke Craig, for the defendant.

CLARK, C. J. The plaintiff is United States Judge for the Eastern District of North Carolina. The County Commissioners of Wake County, "under the advice and peremptory instruction of the Corporation Commission, acting as a Board of State Tax Commissioners," have assessed and levied an income tax upon the income received by the plaintiff from the United States as such Judge (after deducting the $1,000 exemption allowed by law), and the defendant, as Sheriff and tax collector of Wake County, has levied upon the personal property of the plaintiff and threatens to sell the same to satisfy the income tax as aforesaid. All other taxes assessed against the plaintiff have been paid except this income tax on his income from the Federal Government as Judge,

which tax he claims is illegal, and asks for an injunction to restrain the defendant from selling his property to collect the same.

It has been so long and so well settled by the highest Federal Court that no State can tax the compensation allowed by the Federal Government to its officers that it had not been thought that the point could again be raised. *Dobbins v. Erie County,* 41 U. S., 435; *King v. Hunter,* 65 N. C., 412; 6 Am. Rep., 754. In *Collector v. Day,* 78 U. S., 1113, it is said: "In *Dobbins v. Commissioners of Erie County* it was decided that it was not competent for the Legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt." In that case the Court held that for the same reason the United States Government is prohibited from taxing the salary of the officers of a State Government.

As the power of a State to tax is limited only by a restriction, if any, in the State Constitution, and there is none in ours as to the income tax, which can be levied at any rate the Legislature sees fit, if only it is uniform for each class, and of this classification the Legislature is the judge, it follows that if the General Assembly can tax the incomes of Federal officers they could tax them to be unprofitable; in short, tax them out of existence, as the United States did State banks of issue. *Veasie Bank v. Fenno,* 75 U. S., 533. In *McCulloch v. Maryland,* 17 U. S., 316, *Marshall, C. J.,* well said: "The

power to tax is the power to destroy." For exactly the same reason, to preserve the independence of the judges and the executive officers named in the Constitution, the General Assembly is forbidden to diminish their salaries, which includes a prohibition of the power to reduce them by taxation, which was settled in this State by the opinion of Attorney-General Batchelor, adopted by the Supreme Court (Nash, Pearson and Battle), 48 N. C., 555, and has since been reiterated by Attorney-General Gilmer and approved by the Court, 131 N. C., 692. The same purport, *New Orleans v. Lea,* 14 La., Ann., 197, and many other authorities.

The only difference is that the State cannot tax the salary of *any* Federal officer, nor can the Federal Government tax the salary of *any* State officer, since neither has the right to reduce the support allotted by the other government for its officers, while the State is only prohibited from reducing, by taxation or otherwise, the salaries of the Judges and of the few executive officers named in the Constitution; and Congress is likewise prohibited by the Federal Constitution only from reducing, by taxation or otherwise, the salares of the Judges and the executive officers named in that instrument. The salaries (and indeed the continued existence) of all officers of the United States and of the State, not thus designated in their respective Constitutions, being subject to the will of the legislative power of each respectively, are not thus protected by constitutional provision from taxation by its own government.

These exemptions are not "special privileges" to officials, but are made by reasons of the highest public policy. If the State could tax the salaries of Federal officers, or the Federal Government could tax the salaries of State officers, either could destroy the efficiency of the operations of the other government, since each government must act through its officers. So if Congress could reduce, by taxation, the salaries of the

Federal Judges or chief Federal executive officers, or the State Legislature could reduce, by taxation, the salaries of the State Judges and chief executive officers of the State, the judicial and executive departments would be dependent upon the will of a shifting majority in the legislative branch of the government. It was to prevent this that, profiting by the lessons of history, the Federal and State Constitutions have named the chief officers of the judicial and executive departments and placed their support beyond the power of the Legislature to reduce in any mode.

In *King v. Hunter,* 65 N. C., at p. 612, 6 Am. Rep., 754, *Reade, J.,* says: "It has been considered how far an officer or officers may be taxed. And it is considered *as settled* that the State has no power to tax an officer of the United States, or *vice versa,* because 'the power to tax includes the power to destroy,' as was said by *Chief Justice Marshall,* in *McCulloch v. Maryland,* 4 Wheat., 207. And if a State were allowed to tax a United States officer one dollar, it might tax him to the full amount of his salary, and thus 'arrest all the measures of the government.' And so the United States cannot tax a State officer for the same reason." This settles the case before us. Upon the same principle the Federal Courts have often held that the United States Government cannot tax the incomes of State officers. *U. S. v. Ritchie,* 27 Fed. Cas. No. 16, 168; *Day v. Buffinton,* 7 Fed. Cas. No. 3076 (*Clifford, J.*), affirmed, 78 U. S., 113; *Freedman v. Sigel,* 9 Fed. Cas. No. 5080.

The officials of the State and of the United States whose salaries are protected from diminution by the legislative power of their respective governments are very few in number, and they are pointed out in the Constitution of each. There can be no doubt who they are. But as the salaries of all the officers of the Federal Government are exempt from State taxation, and those of all State officers are exempt from Fed-

eral taxation, a question may often arise as to who is an "officer"; for instance, it is held that clerks in the post-office, though their appointments have been approved by the Postmaster-General, are not such officers, and they are taxable on their incomes, as such. *Melchor v. Boston,* 50 Mass., 73. But we are not called upon to discuss that point in this case.

Nor do we feel inclined to enter upon the somewhat metaphysical discussion at bar of the difference, if any, between the income and salary of an officer. Of course the income of an individual, who is an officer, from other sources than his salary, is taxable, if not otherwise exempted as being derived from property already taxed. It is also true that if on the day for listing taxes (usually in this State, 1 June) the officer has in hand cash derived from his salary unspent, or property which has been bought with the savings from his salary, such "cash in hand" or other property is taxable *ad valorem* at the same rate of all other property of like value and kind. But the tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it, and from such income tax the officers above named, and in the cases there named, are exempt for the reasons given in the authorities cited, while others are taxed on such income, subject only to the exemption named in our statute of $1,000, and the further exemption of income derived from property already taxed.

As to the other point, whether the plaintiff can maintain an injunction against the sale of his property under an illegal tax, or must pay the tax under protest and sue to recover it back, it is equally well settled that he can pursue either remedy. *Range Co. v. Carver,* 118 N. C., 331; *Armstrong v. Stedman,* 130 N. C., 217; *Brinkley v. Smith,* 130 N. C., 224, hold that under the language of the statute "injunctive

relief may be invoked by a tax payer when the tax is *invalid or illegal.*"

The Legislature is presumed to know the law, and when it levied a tax upon incomes it did not intend to authorize a tax upon incomes exempt by the Constitution of the State or Federal Government for such taxation. The act of the officer in attempting to collect such tax is not authorized by law, and he was properly restrained from selling.

Affirmed.

BARNES v. SOUTHERN RAILWAY COMPANY.

(Filed October 15, 1903.)

TRIAL — *Appeal — Dismissal — Justices of the Peace — Appearances — Judgment—The Code, sec. 880.*

Where the defendant, in an appeal from a justice of the peace, fails to appear in the superior court, having answered and raised a material issue, no judgment can be entered against him without a trial.

ACTION by J. D. Barnes against the Southern Railway Company, heard by Judge *H. R. Bryan*, at May Term, 1903, of the Superior Court of HARNETT County. From a judgment for the plaintiff the defendant appealed.

Stewart & Godwin, for the plaintiff.
F. H. Busbee & Son, for the defendant.

WALKER, J. The plaintiff brought this action before a justice of the peace to recover damages for injury to a lot of tobacco shipped by him over its line of railway. It appears that issue was joined between the parties before the justice who tried the case and gave judgment for the plaintiff, from

which the defendant appealed. No question was made in this Court as to the regularity of the appeal. The defendant seems to have complied in all respects with the law relating to such appeals, and the case was duly docketed in the Superior Court. At May Term, 1903, the Court rendered judgment "that the defendant's appeal be dismissed," for the reason, as was admitted in this Court, and as is stated in the brief of defendant's counsel, that the defendant had failed to appear and prosecute his appeal.

The Code provides that where an appeal is taken from a justice of the peace a return to the appeal shall be made by the justice to the Superior Court, and "the Clerk shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of the Court." The Code, sec. 880. When there is an appeal, therefore, the whole case must be tried *de novo* in the Superior Court. This being the law, the case stood upon the docket for the purpose of a trial just as any other case then pending in that Court which was at issue, and the mere absence of the defendant did not relieve the plaintiff from the necessity of establishing his cause of action before a jury. When a case brought to the Superior Court by appeal from a justice of the peace is called for trial, if the plaintiff does not appear and prosecute, the Court can have him called out and enter a non-suit, but the same rule does not apply to a defendant who absents himself. No judgment can be entered against him, if he has answered and has raised a material issue, without a trial. In such a case there must be a verdict before there can be a judgment. The Court can only dismiss an appeal when there is some defect or irregularity in the method of taking or docketing it. There was error in dismissing the defendant's appeal, and the judgment will be set aside, and the case will stand for trial in its regular order.

Error.

HOLLY SHELTER RAILROAD CO. v. NEWTON.

(Filed October 15, 1903.)

1. EMINENT DOMAIN—*Appeal—The Code, secs. 1944, 1945, 1946.*

An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom, though a plea in bar was filed by the defendant.

2. EMINENT DOMAIN—*Jury Trial—Issues—Railroads—Acts 1893, ch. 148—The Code, sec. 1945.*

In condemnation proceedings a land owner is not entitled at the hearing before the clerk to have issues tried by a jury.

3. EMINENT DOMAIN—*Collateral Attack—Corporations—Charter—Fraud.*

A charter of a corporation cannot be collaterally attacked as being fraudulent.

4. EMINENT DOMAIN—*Amendments—Railroads.*

In an action to condemn land for railroad purposes the court may allow an amendment to the complaint of a better profile.

5. INJUNCTION—*Eminent Domain—Railroads.*

An injunction will not lie to restrain a railroad company from entering upon land before the appraisement of damages and the payment thereof.

ACTION by the Holly Shelter Railroad Company against H. B. Newton and others, heard by Judge *W. R. Allen*, at September Term, 1903, of the Superior Court of PENDER County. From an order remanding the proceedings to the Clerk to proceed the defendant appealed.

Iredell Meares, for the plaintiff.

Rountree & Carr and *J. D. Bellamy*, for the defendants.

CLARK, C. J. This was a proceeding begun before the Clerk under The Code, sections 1944 and 1946 to condemn a right of way for a railway. The defendants appealed to the Judge before the appointment of commissioners and the coming in of their report, the time at which an appeal in such cases is authorized by The Code, section 1946. The Judge remanded the case to be proceeded in as required by that section. Thereupon the defendants appealed to this Court. No appeal lay, as we have already held in this cause at this term, upon the defendant's application for a writ of prohibition to prevent the Clerk from proceeding under the Judge's order of remand, pending this attempted appeal which must therefore be dismissed.

If interlocutory appeals were allowable in such cases, they could be repeated again and again, on divers pretexts, and great delays to the detriment of the public interest would hamper and impede and render almost impossible the construction of new railways. It is conceivable that such appeals might be greatly fostered by lines already in existence, if averse to threatened competition. Therefore, the statute, The Code, sections 1945, 1946, is explicit in denying interlocutory appeals in proceedings for condemnation of right of way for railroads. The interest of the land owner is preserved by the payment into Court of the full assessed value of the strip of land condemned, which is required before the corporation can enter upon the premises. The decisions are uniform that the above is the unmistakable meaning and the reason for the statute. *Telegraph Co. v. Railroad Co.*, 83 N. C., 420 (where the matter is fully discussed by *Smith, C. J.*); *Railroad v. Railroad, Ibid.*, 499; *Commissioners v. Cook*, 86 N. C., bottom p. 19; *Railroad v. Warren*, 92 N. C., 622 (in which the reason for the statute is given), and *Hendricks v. Railroad*, 98 N. C., 431, which says the above authorities "*settle the course of practice* in such pro-

ceedings and sufficiently state the reason for it." The above authorities have been cited and reaffirmed in this very cause (*Railroad v. Newton*, at this term) in denying the petition for a writ prohibition, as above stated.

The defendants contend, however, that an appeal does lie, because there is here a plea in bar. But the statute and the decisions make no exception when there is a plea in bar in cases of condemnation. Indeed in *Railroad v. Railroad*, 83 N. C., 499, there were two pleas in bar and the Court held that no appeal lay till after the confirmation of the commissioners' report. The defendants contend that they are entitled to have the issues of fact raised by the answer tried by a jury. But that right they can have on appeal to the Superior Court after the report of the commissioners is confirmed. Formerly the land owner had no right to a jury trial in fixing the compensation upon condemnation of a right of way, nor was the compensation required to be paid before entry. *Railroad v. Davis*, 19 N. C., 452; *Railroad v. Parker*, 105 N. C., 246; *State v. Lyle*, 100 N. C., at p. 501. The Code, sec. 1946, changed this as to railroads, by requiring the company to pay into Court the sum assessed before entry upon the right of way, and Laws 1893, ch. 148, further provides that the land owner "shall be entitled to have *the amount of damages assessed by the commissioners* or jurors heard and determined upon appeal before a jury of the Superior Court in term, if upon the hearing of such appeal a trial by a jury be demanded." Thus this statute, as well as The Code, sec. 1946, recognizes that the appeal is allowed after confirmation of the report of the commissioners. The language of section 1946 is that upon the coming in of the report exceptions may be filed thereto, "and upon the *determination of the same* by the Court, either party may appeal to the next Court at term, and thence, *after judgment*, to the Supreme Court."

This is a proceeding *in rem*, acting upon the property, and

service of summons and complaint upon the defendant Newton, a non-resident, in the mode prescribed by chapter 120, Laws 1891, Clark's Code (3 Ed.), sec. 218 (8), which was here used, "is a convenient and probably a more sure way of bringing home to the defendant the notice which was formerly made solely by publication." *Long v. Ins. Co.,* 114 N. C., 469.

The defendants contend further that the charter of the plaintiff as a railroad company is a fraud, and that the real object is not the conveyance of freight and passengers, but merely to operate a lumber road. If this is true, it would be a fraud upon the public to obtain the right of condemnation by such evasion, and upon a direct attack by *quo warranto* the charter would be vacated upon the establishment of the fraud, and the Judge might make appropriate orders in that cause to preserve the rights of the relator in such action *pendente lite,* upon sufficient facts shown. That this railroad is to be only five miles long and is to run, not from one town to another, but from a river to a creek, raises a strong doubt as to the *bona fides* of the charter, but that is an issue of fact for a jury in a direct proceeding to attack the charter for fraud. Upon the face of the papers, the charter is regular and has been regularly granted. "Of course the charter of a corporation cannot be collaterally attacked, and a direct proceeding must be brought to annul it. But if the charter were on its face inoperative and void, a Court would so declare it in any proceeding to condemn land by virtue of the right of eminent domain." *Railroad v. Stroud,* 132 N. C., 414. The same ruling that the charter cannot be collaterally attacked by answer in condemnation proceedings was made in *Railroad v. Lumber Co.,* 114 N. C., 690.

It was also held in Stroud's case that the filing of a proper profile is a condition precedent before an order of condemnation should be granted. The Judge here allowed an amend-

ment to file a better profile, as he had power to do. *Railroad v. Newton,* at this term; *Faison v. Williams,* 121 N. C., 152. Should the final judgment be adverse to the defendants and be appealed from, then, if the amended profile is insufficient like any other error, it will vitiate the proceedings, and the money paid into Court by the plaintiff will be subject to the orders of the Court. The Code, sec. 1946. As the assessment so paid in is for the value of the land as well as the timber, it should be more than sufficient to reimburse the loss of any timber cut; besides, the Court can make orders *pendente lite,* as suggested in the former decision in this cause at this term. That an injunction will not lie in a case like the present is fully considered and re-affirmed on a rehearing in *Railroad v. Lumber Co.,* 116 N. C., 924.

Appeal dismissed.

HOLLY SHELTER RAILROAD CO. v. NEWTON.

(Filed September 29, 1903.)

PROHIBITION—*Eminent Domain—Writs—The Code, secs. 116, 256, 1945, 1946.*

A writ of prohibition is not a writ of right, but its issuance is a matter of discretion, and will not be granted to prevent the clerk of the superior court from hearing an application for the condemnation of a right of way for a railroad.

This was an application to the Supreme Court by the defendant for a WRIT of PROHIBITION.

Rountree & Carr and *J. D. Bellamy,* for the petitioners.
Iredell Meares, in opposition.

CLARK, C. J. This is an application by the defendants for a writ of prohibition upon the following state of facts: The plaintiff, on the face of the papers, a duly incorporated railroad company, on 7th July, 1903, filed a petition before the Clerk of the Superior Court of Pender County for condemnation of a right of way over the defendants' land. On the 22d July, 1903, the defendants appeared before the Clerk and objecting specially to the sufficiency of service of summons upon one of the defendants, filed an answer raising, as they claim, issues of fact, and asked that the cause be transferred to the Superior Court at term. This being refused, the defendants appealed to the Judge, who, on 12th September, 1903, allowed the plaintiff to amend by filing an amended profile (*Faison v. Williams*, 121 N. C., 152), and remanded the cause to the Clerk with directions to proceed and hear the cause, giving ten days' notice to each party. From this order of the Judge the defendants appealed. The Clerk being correctly of opinion that this order of the Judge was interlocutory and that no appeal lay, proceeded to execute the order of the Court by giving due notice that on 24th September he would proceed with the hearing. The defendants ask for a writ of prohibition to the Clerk, alleging that irreparable damages will accrue if the Clerk proceeds with the hearing and shall appoint commissioners to assess damages.

The writ of prohibition can issue only from this Court, and is authorized by Article IV, section 8 of the Constitution. It only issues in cases where it is necessary to restrain the action of the lower Courts, proceeding outside of their powers, and even then it is not a writ of right, but its issuance is a matter of discretion, and it "issues only in cases of extreme necessity." 23 Am. and Eng. Enc. (2 Ed.), 212; High on Extraordinary Remedies, secs. 763 and 765. It will not issue when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage

will be done. *State v. Allen,* 24 N. C., 183; *Perry v. Shepherd,* 78 N. C., 83; *State v. Whitaker,* 114 N. C., 818. These seem to be the only cases in which application for this extraordinary remedy has been made in this State, and in all of them it was refused. In *State v. Allen, supra, Gaston, J.,* says the writ should not issue except in a very clear case, peremptorily calling for an immediate remedy, and then only after notice to the opposite side and upon affidavits. In *State v. Whitaker, supra,* it was said that if the emergency was so great and immediate that notice could not be given, a notice to show cause would issue with a stay of proceedings.

In the present case no appeal lay from the order of the Judge remanding the case to the Clerk to proceed, and the attempted appeal, if perfected, would be dismissed here, being taken without authority of law. Of course this Court could not issue its prohibition to the Clerk against executing the order of the Judge when there has been no appeal authorized by law. While the general rule is, as set out in The Code, sections 116 and 256, that upon issues of fact or law arising before the Clerk the cause is transferred at once to the Court at term, in this matter of condemnation of right of way for railroads, for reasons of public policy and to prevent delays by appeals from interlocutory judgments which would seriously interfere with the construction of railroads, it is specially provided otherwise. *Railroad v. Warren,* 92 N. C., 622.

The Code, sec. 1945, provides that the Clerk shall hear and decide the application for condemnation and appoint commissioners, and section 1946 provides that upon the coming in of the report, exceptions may be filed *"and upon the determination of the same* by the Court, either party may appeal to the Court at term, and thence, after judgment, to the Supreme Court." This last section provides further that upon the payment into Court of the sum appraised as dam-

ages, the company may enter upon the right of way, "notwithstanding the appeal," and that if on appeal the Court refuses to firm the condemnation of the land, the company shall surrender the land, with power in the Court to issue a writ of restitution, and that it shall adjudge what portion of the fund paid into Court in such case shall be returned to the company, the object evidently being to vest in the Court the power to adjudge payment to the land owner of the damages sustained by him from the entry. As entry is only authorized after the report of the commissioners is confirmed by the Clerk and payment into Court of the sum assessed, there could be no great amount of damages, if any, in excess of the sum adjudged by the commissioners and the Clerk as the full value of the land, in the brief period pending an appeal to the Judge. If, in an extraordinary case, it should appear that there is danger of damage to the land owner in excess of the sum assessed and paid in, it may be that the Judge, in the exercise of his sound discretion, can order the company to file a bond to cover such possible excess, and upon failure of the company to comply with such order, restrain it from proceeding to enter; but it should be a very clear case to authorize the Judge to require more than the statute. Certainly there can be no call for this Court to interfere with the regular proceedings of the Court below by prohibiting the Clerk from appointing commissioners. The defendants have complained before they are hurt.

That no appeal lay at this stage, *i. e.*, from the Judge remanding the cause to the Clerk, has been repeatedly adjudged. *Telegraph Co. v. Railroad*, 83 N. C., 420 (where the subject is fully discussed by *Smith, C. J.*); *Railroad v. Railroad, Ibid.*, 499; *Commissioners v. Cook*, 86 N. C., bottom of p., 19; *Railroad v. Warrne*, 92 N. C., 622 (where it is said that the object of the statute is to expedite the construction of works of internal improvement by allowing them to

proceed upon payment into Court of assessed damages without interruption by appeals, which in such cases lay only from the final judgment); *Hendricks v. Railroad,* 98 N. C., 431, which says: "They settle the course of practice in such proceedings and sufficiently state the reason for it."

But even if an appeal lay and the Clerk had been proceeding unadvisedly, it does not follow that the Court would intervene by this extraordinary writ. High on Extraordinary Remedies, secs. 767, 770, 771; 23 Am. and Eng. Enc. (2 Ed.), 207-211.

Prohibition on very similar facts to these was refused. *Parker v. Snohomish,* 25 Wash., 544; *State v. Court,* 7 Wash., 74.

Petition denied.

CARROLL v. MCMILLAN.

(Filed October 15, 1903.)

PLEADINGS—*Verification—The Code, sec. 258.*

The verification of pleadings must state that the same are true to the knowledge of the affiant, except as to those matters stated on information and belief, and as to those matters he believes the same to be true.

ACTION by S. Carroll against D. J. McMillan and others, heard by Judge *R. B. Peebles,* at March Term, 1903, of the Superior Court of PENDER County. From a judgment for the defendants the plaintiff appealed.

Rountree & Carr and *J. T. Bland,* for the plaintiff.
Stevens, Beasley & Weeks, for the defendants.

CONNOR, J. Plaintiff in this action filed his complaint, duly verified. Defendants filed their answer, in which, among

other things, they set forth new matter, constituting a counter-claim. The verification of the answer is in the following form: "That he has read the foregoing answer and knows the contents thereof, that the facts set forth therein of his own knowledge are true, and that those stated on information and belief he believes to be true." At the March Term, 1903, of Pender Superior Court, the case was called for trial. Defendants moved for judgment on the counter-claim set up in the answer, for that no reply had been filed thereto by the plaintiff. This action on the part of the defendants was met by a motion on the part of the plaintiff for judgment on the complaint for that the answer was not verified as required by The Code. The Court denied the plaintiff's motion and rendered judgment for the defendants. Plaintiff excepted.

There is error. The answer was not verified in accordance with section 258 of The Code, as construed by this Court in *Phifer v. Insurance Co.,* 123 N. C., 410. The verification of the answer is in almost the identical language as that used in Phifer's case, which, for the reasons pointed out by the Court, was held insufficient. Clark's Code, sec. 258, and cases cited. Unless the defendants shall obtain leave from the Court to amend their verification so that it may conform to the provisions of The Code, the plaintiff will be entitled to judgment by default and inquiry. As the cause goes back for further proceedings, it will be within the discretion of the Judge to permit the amendment and to permit plaintiff to file a reply to the counter-claim, that the parties may proceed to the trial of the matters in controversy.

Error.

McARTHUR v. MATHIS.

(Filed October 15, 1903.)

SALES—*Chattel Mortgages.*

Where the owner of lumber authorizes a creditor in possession thereof to sell it and pay himself, such transaction constitutes a present sale of the lumber and passes title, freed from the lien of an unregistered mortgage.

ACTION by J. A. McArthur againt Lewis Mathis, heard by Judge *R. B. Peebles* at February Term, 1903, of the Superior Court of DUPLIN County. From a judgment for the plaintiff the defendant appealed.

No counsel for the plaintiff.
Stevens, Beasley & Weeks, for the defendant.

CONNOR, J. This is an action brought in the Superior Court for the recovery of the possession of a lot of lumber. The Court found the following facts: The defendant Mathis owned a tract of land in Duplin County on which were some standing timber trees, part of which he sold to one Newkirk at ninety cents per thousand feet. Newkirk contracted with the plaintiff McArthur for the sawing of the trees into lumber, for which he was to pay the plaintiff $3 per thousand feet, and to secure the performance of his part of the contract he gave to the plaintiff a chattel mortgage on the sawed lumber. This mortgage was never registered. After sawing the trees the plaintiff removed his saw mill from the land, leaving a lot of sawed lumber where he had piled it on the land near where the saw-mill stood. After the mill was removed the defendant notified the plaintiff and Newkirk not to remove any of said timber till he was paid for the trees. Newkirk then told the defendant to take possession of the lumber, sell

it and apply the proceeds to his claim. The defendant sold a part of the lumber as directed. All of the lumber left on the defendant's land was not sufficient to pay either the plaintiff's or the defendant's claim. Upon the facts found the Court rendered judgment in favor of the plaintiff.

We are of the opinion that as against the defendant the plaintiff's unregistered mortgage was invalid, and that the transaction as found by the Court constituted a sale of the lumber by Newkirk to the defendant. The lumber was upon the defendant's land and in his actual possession; nothing more was to be done to complete the sale. He was to sell it and apply the proceeds to his debt. The value of the lumber was not sufficient to pay the debt in full, hence in no point of view could Newkirk have any further interest therein. This Court, in *Jenkins v. Jarrett,* 70 N. C., 255, makes the following quotation from Blackburn on Sales: "Generally speaking, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately so as to cast on the purchaser all future risks, if nothing remains to be done with the goods, although he cannot take them away without paying the price. When the parties are agreed as to the goods on which the agreement is to attach, the presumption is the parties intend the right of property to be transferred at once, unless there be something to indicate a contrary intention." *Wittkowsky v. Wasson,* 71 N. C., 451; *Phifer v. Erwin,* 100 N. C., 59.

Upon the facts found judgment should have been rendered for the defendant.

Error.

SOLOMON v. WILMINGTON SEWERAGE CO.

(Filed October 15, 1903.)

INJUNCTIONS—*Restraining Order.*

Where the plaintiffs alleged that defendant, a public sewer corporation, had contracted to furnish sewer facilities to plaintiffs and other lot owners in consideration of an initial payment of $50 for connections and an annual rental of $2, and that by a change in defendant's by-laws the annual charge had been increased, that such new rental was unreasonable and exorbitant, and that defendant was discriminating in such change in favor of some patrons and against others, and had threatened that unless plaintiffs paid the increased rate their connections would be cut off, the effect of which would be to cause plaintiffs irreparable damage. Defendant answered, admitting the raise, denying that the new rate was unreasonable and that any discrimination existed. On such pleadings alone an order refusing to dissolve a temporary injunction and continuing the same until the trial was proper.

ACTION by B. Solomon and others against the Wilmington Sewerage Company, heard by Judge *R. B. Peebles,* at Wilmington, March 24, 1903. From a judgment for the plaintiffs the defendant appealed.

Bellamy & Bellamy and *Rountree & Carr.* for the plaintiffs.

J. D. Bellamy and *E. K. Bryan,* for the defendant.

CONNOR, J. The plaintiffs allege that the defendant company was duly incorporated by the General Assembly of this State with authority to establish a system of sewerage in the city of Wilmington, and to charge for the use of said sewers such reasonable sums as the board of directors should from time to time adopt, and with the authority to enforce the collection of such charges by severing the connection of such

defaulting user with the main sewer. That pursuant to permission granted by the city of Wilmington, the defendant laid its pipes and mains along and under certain streets of said city upon which the plaintiffs and other persons resided. That the plaintiffs and a great many other citizens of Wilmington living along the streets and alleys upon which, by public authority, the defendant has laid its pipes and constructed its sewerage system were desirous of obtaining the benefit of an efficient sewerage system for their respective premises at what they regarded as a reasonable cost, and each of the plaintiffs and the others so situated made application for connection therewith. That the defendant company proposed to these plaintiffs, and for all others for whom this suit is brought, that if they would pay to the defendant the sum of fifty dollars for making the connection between the premises of each and every one of these plaintiffs and the others and the pipes of the defendant company, that the defendant would charge each of them so paying the sum of fifty dollars an annual rental, as aforesaid, for the use and service of the sewerage system of the defendant, the sum of two dollars, and no more; or that if persons desiring to connect with and use their said sewerage system preferred it, they might pay twenty-five dollars for connection and an annual rental of four dollars. That each of the plaintiffs and many more residents and citizens on the streets and alleys along which the sewerage system of the defendant company had been constructed, and on whose behalf this suit is also brought, accepted the first proposition of the defendant company and entered into a contract with the said company by which each of them paid to the said defendant company the sum of fifty dollars for connection, and entered into a contract to pay to the said company an annual rental of two dollars for the use of the sewerage system of said company, and many other citizens, residents on the streets and alleys along which the said sewer-

age system had been constructed, accepted the alternative proposition of the defendant and entered into a contract by which they paid to the defendant for connection twenty-five dollars, and agreed to pay four dollars per annum as rental for the use of said sewerage system; and these contracts so entered into by the defendant and the plaintiffs and all others for whom this suit is brought have been scrupulously kept and performed on the part of both contracting parties up to the first day of January, 1903. That the stock of said company thereafter passed into the hands of persons other than those owning it at the time of the making of said contracts, and that the defendant company on or about the first of January, 1903, in utter disregard and violation of the contract rights of these plaintiffs and all others for whom this suit is brought, undertook to raise the rate of annual rental of said sewerage system to an unreasonable and exorbitant rate, greatly in excess of the contract rates hereinbefore set out, and served a notice on these plaintiffs that unless payment was made in accordance with the advanced charges, unreasonably and unjustly and in violation of the contract rights of the plaintiffs exacted by the defendant, that the defendant company would disconnect the premises of the person so refusing to pay with the main sewer. That these plaintiffs have heretofore and in proper time tendered to the defendant the various sums due by each one of them as an annual rental for the service of the sewerage system, strictly in accordance with the terms of their contract, and it was refused by defendant company. The plaintiffs allege that if the threat of the defendant is carried out and their premises are disconnected with the main sewer, the injury will be to them and each of them irreparable, and an action for damages would be, as they are advised, totally inadequate; that the defendant is insolvent and has an existing mortgage upon its entire system for $150,000, which is greatly in excess of the sum

which the system would bring upon public sale; that the rates demanded by the defendant are not only unjust and unreasonable, but they are discriminating, in that some of the patrons of the defendant who are situated with reference thereto as the plaintiffs have been offered more advantageous terms and more reasonable rates than those exacted from the plaintiffs. The plaintiffs ask that the defendant be enjoined from disconnecting the premises of the plaintiffs or in any manner interfering with the proper use of the sewerage system by the plaintiffs, and from charging or exacting more for the use of their system than the prices fixed in the contracts.

The defendant company, answering the complaint, says that at the time the alleged contract was made with the plaintiffs the defendant had in force the following by-law: "Article 3. The charge or fee for connecting with the company's sewer shall be $50 for every connection made for each person or house; it shall be payable strictly in advance. All persons connecting shall also pay a fee of $2 per year, also in advance, for keeping in repair the sewers; any failure to pay this fee for twenty days shall subject the delinquent to a forfeiture of his right, and the company at its option shall have the right to sever the connection." That on September 15, 1895, the by-laws were amended as follows: "On and after this day the sum of $50 with an annual rental of $2, or the sum of $25 with an annual rental of $4, shall be charged each resident for a connection, but there shall be no additional charge for servant houses or stable connections with said residence and used by the occupants thereof." That the rate fixed at either of said dates was not, and was never intended to be, a permanent contract that the defendant should never change its rates, but on the contrary they were rates established by a mere by-law, which was changeable at the will of the company; that thereafter the defendant obtained the per-

mission of the city of Wilmington to extend its system of sewers through all the streets of the city at a very great cost, to-wit, $200,000, and constructed a large and efficient sanitary system, together with the most modern and approved form of disposal plant, and laid down about forty miles of pipes and connections, and thereby found it absolutely necessary to change the rates for sewerage connections in order to obtain a just and reasonable return for the investment made; that on November 3, 1902, they adopted a new set of by-laws conferring upon the board of directors the right to fix a schedule for annual charges for sewer service; that they thereafter adopted the schedule adopted in the answer, and that such charges are reasonable, just and proper. The defendant admits that it did undertake to raise the rental for the use of the sewerage system, as alleged, and that such rates are much lower than many other cities in the United States, and as a comparison with the rates of a number of other cities an exhibit is attached to the answer. The defendant admits that it served notice upon the plaintiffs that unless payment was made in accordance with the new rates, it would disconnect them, as it claimed it had the right to do. It admits that the plaintiffs tendered to the defendant the old rate that the plaintiffs were paying. It denies that the rates charged the plaintiffs are discriminating, and alleges that they are uniform and without discrimination in favor of or against any person. The defendant further says that when the company was granted the right to sewer the city the State Board of Health and the Board of Health of the city annexed as a condition of its approval of the new system of sewerage that no part of the old sewers of the company, with which the plaintiffs were connected, should be used; that the pipes were not laid with the proper fall, and were frequently obstructed and became unsanitary; that upon the completion of the new system the defendant disconnected the plaintiffs with the old

sewers and connected them with the new sanitary sewers. The answer has attached the rules and regulations, showing the charges, etc., also a schedule showing the comparative charges in other cities for sewerage.

Upon the hearing of a motion to continue the restraining order the Court continued the same to the hearing, providing that the plaintiffs should pay such rents and tolls as they had agreed to pay, and giving the defendants permission to move to vacate the order upon their failure to do so. From this order the defendants appealed.

In the argument before us quite a number of interesting questions were presented, several of which we do not think it necessary to consider or pass upon at this time. No affidavits were filed either in support of the complaint or answer, and his Honor found no facts in regard to the controverted matters. The defendant insists, or contends, that admitting the facts set out in the complaint to be true, the plaintiffs are not entitled to injunctive relief, for that the threatened breach of the contract would inflict no irreparable injury upon them. That such injury, if any, that they might sustain could be compensated in damages. This is an action for a special, as distinguished from a common, injunction, as pointed out in *Heilig v. Stokes,* 63 N. C., 612, *Rodman, J.,* saying: "The injunction is special in its nature. In such case the practice is to continue it, if in the opinion of the Court it appears reasonably necessary to protect the rights of the plaintiff, until the trial." *Pearson, J.,* in *Purnell v. Daniel,* 43 N. C., 9 says: "This is not the case of an ordinary or common injunctive relief is based upon two allegations: first, that is the point in the cause; it is to prevent irreparable injury (as is alleged) and to dissolve the injunction, besides the case; for to dissolve it, allows the act to be done. * * * To dissolve the injunction before hearing the cause on the proof, the defendant must show that the plaintiff has no case

fit to be heard; and if, from the answer, it appears that there is any question of doubt on a matter that should be further inquired into, the injunction will be continued to the hearing." *Lowe v. Commissioners,* 70 N. C., 532; *Blackwell v. McElwee,* 94 N. C., 425. The plaintiffs' ground for asking injunctive relief is based upon two allegations; first, that that to raise an annual rental for the use of the sewer would be a breach of the contract between themselves and the defendant, and second, that the new rental charge is unreasonable and exorbitant, and that they are not only unjust and unreasonable, but are discriminating in that some of the patrons have been offered more advantageous terms and more reasonable rates than those exacted from the plaintiffs. Both allegations are denied. If the latter be true, it is clear that the plaintiffs are entitled to an injunction until the facts can be ascertained. In *Griffin v. Water Co.,* 122 N. C., 206; 41 L. R. A., 240, this Court held that upon an allegation of this kind an injunction should be continued till the final hearing. It is clear that the defendant is engaged in a business in which the public have an interest, and that the acceptance of the franchise carries with it the duty of supplying sewerage to all persons along the line of its mains without discrimination and at uniform rates. The defendant says that the contract set out by the plaintiffs is incapable of specific performance, because, no time being fixed for its continuance, it was determinable at the will of either party, and that the defendant's charter allowed it to make rates from time to time, and that said contract was made with reference to and in view of this power in the board of directors. The defendant further says that the contract is against public policy, for that "a private corporation whose business is of a public character and which owes peculiar duties to the public can make no contract which will have the effect of disabling it, even partially, from performing such duties—such a contract is con-

trary to public policy and void." The defendant further says that the contract is void because there is no mutuality, there being no obligation on the part of the plaintiffs to use the sewer and pay the rental for any definite time. These contentions present interesting questions, the decision of which is dependant upon the findings of fact in regard to the controverted questions raised by the pleadings, and we do not at this time deem it wise to express any opinion upon them further than is necessary to dispose of this appeal. In Spelling on Injunctions and Extraordinary Remedies, sec. 504, it is said: "It needs no argument or authority to support the proposition that a violation of a contract to furnish a supply of water for use or consumption may inflict irreparable injury. * * * On the same principle, evidence other than that necessarily apparent from a statement of the case is usually not required in support of an injunction against the attempted breach of a contract to furnish water. And as a court of law cannot prevent destruction of the owner's use of the water, he need not resort to his action for damage, but may seek relief in equity, and the destruction being a palpable breach of contract, he need not show that irreparable injury would result. On the same ground of preventing irreparable injury, an injunction lies to prevent a water-works company from cutting off its water supply, where the consumer has offered to pay in advance the proper amount for the use of the water during the year, and the company claims a higher rate than is really true and exigible." The law as thus laid down is sustained by the authorities. In *Xenier Real Estate Co. v. May,* 47 N. E. Rep. (Ind.), 147, the plaintiff alleged that it had made a contract upon valuable consideration by which the plaintiff was to furnish gas sufficient for the purpose of operating an electric light plant so long as the latter would supply gas. The Court said that the contract was sufficiently definite and used the following lan-

guage: "We think the complaint not only states facts sufficient to enable appelle to damages, but also to an injunction." In *Graves v. Key City Gas Co.*, 50 N. W. Rep. (Iowa), 283, the plaintiff alleged that he had made a contract with the defendant company to furnish gas free of charge for twenty years for all ordinary purposes in his dwelling. The defendant threatened to cut off the connection between his residence and its pipes. In response to the suggestion that the threatened injury could be compensated in damages the Court said: "If the defendant may withhold the supply of gas, the plaintiff may obtain it from no other existing source, for the defendant, it appears, has, in effect, at the present, a monopoly of the right to furnish gas to private consumers, such as the plaintiff. His gas pipes and gas burners and fixtures would be useless and valueless and he would be deprived of gaslight, which, to a certain extent, is regarded by housekeepers using it as a necessity and a source of comfort. As the plaintiff can supply his dwelling, outhouses and street lamps in no other way, this injury cannot be repaired. If the defendant supplies him with no gas, he must do without it and the comfort it brings. It is, therefore, irreparable. It is true he could use candles, oil or electricity, but he contracted for gas light and is entitled to it. It will not do to say he may have compensation in damages. It would be difficult, if not impossible, to estimate his damage. If it might be done, there would be delay in compensation, subjecting the plaintiff to discomfort, inconvenience and loss for probably a protracted period. Equity will not permit one to be deprived of his right in this way by the violation of a contract, but by injunction will interfere to prevent it." *Hendricks v. Hughes,* 117 Ala., 591. The reasoning in this and other cases holding a like doctrine is very much stronger when applied to a sewerage system connected with a dwelling. It becomes not only a matter of comfort and convenience, but seriously affects

the health of the family. We must take notice of the fact that when one has placed in his residence a connection with a sewer and placed pipes and other attachments necessary for its use, to deprive him of the privilege of discharging the sewage into the pipes provided for that purpose would seriously affect the comfort, if not the health, of those occupying the dwelling. We cannot doubt that if the plaintiffs shall ultimately establish their contention in respect to their contractual rights against the defendant, they shall have a perpetual injunction for the protection of such rights.

While we express no opinion in regard to the ultimate result of the litigation in the absence of any evidence or findings of fact by the Court below, we think that upon well settled principles of equity jurisprudence the *status quo* should be maintained during the litigation.

Whether the plaintiff shall be entitled to specific performance of the contract, and for what length of time the contract shall exist, and to what extent it might be in the power of the defendant corporation to perform the contract without impairing or destroying its power to perform its duties to the public, or whether the rates now charged are unreasonable or discriminating, are all questions to be determined upon the facts as they may be found by some competent tribunal upon the final hearing.

We think that his Honor correctly continued the injunction to the hearing, and the judgment in that respect is

Affirmed.

PERKINS v. BRINKLEY.

(Filed October 15, 1903.)

TRUSTS—*Deeds of Trust—Husband and Wife—Dower—The Constitution, Art. X, sec. 6.*

Where land is conveyed to a trustee, who is to pay the rents to a married woman, the wife of the grantor, the *cestui que trust* may compel the conveyance of the legal estate to herself at any time, and hence the trustee is not liable for rents and profits received by the husband of the *cestui que trust.*

ACTION by Mary E. Perkins against Abraham Brinkley, heard by Judge *Frederick Moore* and a jury at May Term, 1903, of the Superior Court of WARREN County. From a judgment for the plaintiff for less than the relief demanded the plaintiff appealed.

Pittman & Kerr, for the plaintiff.

Tasker Polk, Thomas N. Hill and *Day & Bell,* for the defendants.

CONNOR, J. This action was originally brought by the plaintiff against Abram Brinkley as trustee for plaintiff and in his capacity as executor of Dr. W. M. Perkins, deceased, and against the executrix of Dr. Perkins. At the term subsequent to the filing of the complaint plaintiff submitted to a non-suit as to the personal representatives of Dr. Perkins. The plaintiff alleged that on the 28th of January, 1893, Dr. W. M. Perkins, in contemplation of a marriage then about to be solemnized between plaintiff and himself, executed a certain instrument, in writing, conveying to the defendant a tract of land upon the following trusts: "That the above 500 acres of land is conveyed to Abram Brinkley in trust as annuity of rents for Miss Mary E. Cheek during her life-time,

and it is understood that she will not claim for herself, or through any other person, any right, title or interest in any property now owned or may hereafter be owned or become in possession of by said party of the first part, and she relinquishes all right of dower," etc. This deed was executed by the defendant, who was a party thereto. It appears that at the time of the said marriage Dr. Perkins was in possession of the land described in the deed, and remained in possession, receiving all the rents thereon during the whole of the coverture between plaintiff and himself, he having died January 2, 1901.

The verdict of the jury established the following facts: That the defendant Brinkley never took possession of the land described in the complaint, or received the rents and profits thereon, until after the death of Dr. Perkins, or otherwise performed the duties imposed upon him by the said deed; that the said Dr. W. M. Perkins received the rents and profits on the said land from the date of the marriage until his death without objection from the plaintiff, it being conceded that the defendant received the rents for the year 1901 and paid over to the plaintiff $102.50 thereof. The Court rendered judgment for the balance, to-wit, $97.50, to which judgment the plaintiff excepted and appealed.

In view of the non-suit taken by the plaintiff against the personal representatives of Dr. Perkins, the record presents but one question for determination: Was it the duty of the defendant to take into his possession the lands conveyed to him and rent them out, receiving the rents therefrom and paying them over to the plaintiff? The answer to this question depends upon the character of the trust imposed upon him by the deed.

Mr. Tiedeman, in his law of Real Property, section 494, says: "Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits,

to sell the estate, etc., the trust is called active. It is the duty which prevents the operation of the statute, for the trustee must have the legal estate in order to perform his duties. All other trusts are denominated passive trusts, because there is no duty imposed upon the trustee. He simply acts as the reservoir of the legal estate, because from the terms and character of the conveyance and limitation the statute cannot transfer the legal estate to the *cestui que use* or *trust*. Such would be a use upon a use—a use in chattel interests, and *uses to persons incapable of holding the legal estate—for example, married women.*"

The distinction between a simple and a special trust is thus pointed out in Lewin on Trusts, section 18: "The simple trust is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settler, is left to the construction of the law. In this case the *cestui que trust* has *jus habendi,* or the right to be put in actual possession of the property, and *jus disponendi,* or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs. The special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settler's intention, as where a conveyance is to trustees upon trust to sell for payment of debts." Among the last class he says: "And if the trust be simply to permit A to receive the rents, the legal estate is executed in A, this being a mere passive trust."

This Court, in *McKenzie v. Sumner,* 114 N. C., 425, speaking by *Shepherd, C. J.,* says: "As to the real estate devised to the defendant for the benefit of the plaintiff, there is no reason why the legal title is not vested in the plaintiff by the statute of uses, as the land is not conveyed to 'her sole and

separate use,' nor is the trustee charged in any manner whatever with any special duties in respect to the same. * * * The plaintiff being the absolute equitable owner, there are no ulterior limitations to be protected, and under the terms of the will the trustee has nothing but a bare, naked legal estate, unaccompanied, as we have remarked, with a single special duty. As the plaintiff's separate estate is fully protected against the interference of her husband by the provisions of the Constitution, and as the trustee has no power to withhold from her either the property or its income, we are unable to see why the legal title should remain in him, unless it be to enable him to charge the five per cent. commissions which he claims." The trust declared in the deed before us is indefinite. We construe it, however, to mean that the *cestui que trust* is to be permitted to collect and use the rents as her separate estate. The words used are, we think, capable of no other construction. There is no suggestion in the deed that the defendant is required to receive the rents and pay them to her. This construction of the deed, in the light of the authorities cited, would dispose of the appeal but for the fact that the deed was executed in contemplation of the marriage of the *cestui que trust* and that such marriage followed immediately after its execution. Prior to the adoption of the Constitution of 1868 the conveyance of land to a trustee for the benefit of a married woman created an active trust, for that the courts inferred it to be the intention of the maker of the deed to secure to her through the medium of a trustee a separate estate, and it fell under that class of uses which were not executed by the statute, as if "an estate be given to trustees upon a trust for a married woman for her sole and separate use, and her receipts alone to be sufficient discharge; or if a trust deed to permit and suffer a *feme covert* to receive the rents to her separate use, the legal estate will vest in the trustees and the statute will not execute it in

the *cestui que trust.* In all these cases the Court will give this construction to the gift, if possible, for if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor." As by the Constitution of 1868, Art. X, sec. 6, "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband," etc., the wife is secured in the enjoyment of her real and personal estate and all rents, profits and incomes accruing therefrom. It would seem that the reason which existed for construing a declaration of trust for a married woman created prior to the adoption of our Constitution, as an active trust, has ceased. Such seems to have been the view of this Court, as expressed in *McKenzie v. Sumner, supra.* The Supreme Court of Georgia, in *Sutton v. Aiken,* 62 Ga., 733, speaking by *Bleckley, J.,* construing the language of their Code, which is in many respects similar to our constitutional provision, says: "Prior to 1866 (The Code, sec. 1754) such a trust would perhaps have been executory and would have continued on foot so long as the coverture existed, but that act, as has been several times decided, introduced a new rule of property in respect to married women and a corresponding enlargement of their legal capacity. With reference to her separate estate, a female, married or single, is now on full equality with a male, except in a few particulars defined by statute. Save in those particulars, when her equitable rights are commensurate with those of the male, her legal rights are also commensurate with his, and the difference of sex is utterly immaterial. Whenever the subtle action of law-chemistry—perhaps I should rather say law-magic, for it resembles magic more than

natural science—transmutes his equitable rights into legal rights, the like transmutation, the conditions being the same, will be effected upon hers. A consequence of this exact parallelism between the sexes is that a conveyance made since the Act of 1866 in trust for a woman, married or single, of full age and sound mind, with no remainder to protect and nothing prescribed for the trustee to do, operates to pass the legal title immediately into the beneficiary. The trust is executed in the moment of its creation." In *Manning v. Manning,* 79 N. C., 293; 28 Am. Rep., 324, this Court held that "the wife by law is entitled to the exclusive possession of her property as much so as if she were a *feme sole* or a man, and therefore must necessarily have the same remedies for acquiring the exclusive possession and enjoyment of her property, and that the use of such remedies only affects the property and not the social relations between husband and wife established by the contract of marriage." Again, says *Bynum, J.*: "It may be, and perhaps must be, conceded that as to the property of the wife, real and personal, and the rents, issues and profits of it, she is independent of her husband to the extent that she may reduce it into possession, and for that purpose she can, in her own name, resort to any proper action. * * * The plaintiff is entitled to be let into the possession of her lands, and, in a legal sense, the sole and exclusive possession." In *Walker v. Long,* 109 N. C., 510, *Merrimon, C. J.*, citing the constitutional provision, says: "This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried, except in the single respect of conveying it. She must convey the same with the assent of her husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right or estate he might at one time have had as tenant by the curtesy initiate. The strong, exclu-

sive language of the clause recited above is that the property 'shall be and remain the sole and separate estate and property of such female,' the wife." All of our legislation and judicial construction of the Constitution and statutes have been in the same direction. Hence it would seem that the reason which formerly controlled the courts in holding that a trust, when no duty was imposed, for the benefit of a married woman was active rather than passive, no longer exists in North Carolina. It is true that in *Hardy v. Holly*, 84 N. C., 661, this Court, by *Ruffin, J.*, held that she, together with her husband, could not convey her equitable estate without joining her trustee, and that case was affirmed in *Kirby v. Boyette*, 118 N. C., 244. It will be observed, in *Hardy v. Holly, supra*, that the trust was clearly an active one, duties being expressly imposed upon the trustee. In *Kirby v. Boyette* there were no such duties imposed. We are not called upon by this appeal to pass upon the questions involved in those cases. Whether the statute executed the use in the case before us, vesting in Miss Cheek, afterwards Mrs. Perkins, the legal title to the land, it is not necessary for us to decide.

We do not think it improper to say that in the conflict between *McKenzie v. Sumner* and other cases referred to in the very learned brief of the plaintiff's counsel in *Kirby v. Boyette*, and the doctrine as laid down in *Hardy v. Holly* and *Kirby v. Boyette*, we are of the opinion that the principle announced in *McKenzie v. Sumner* is more in consonance with the reason of the thing and the status of the wife in respect to her property under the provisions of our present Constitution.

It is difficult to see how the mere declaration of trust in favor of a married woman, there being no duties imposed upon the trustee or any ulterior limitation of the estate to be preserved, should prevent the operation of the statute. She now has full control over her property and its income, rents

and profits as if she were a *feme sole*. They are not liable for the debts of her husband and in no way subject to his disposition or control. Such deeds are thus taken out of the class mentioned by Mr. Tiedeman as uses "to persons incapable of holding the legal estate." However this question may ultimately be settled, we are clearly of the opinion that the trustee had no power to prevent Mrs. Perkins from assuming control of the land conveyed to him for her benefit, or to prevent her receiving the rents and profits therefrom, and that therefore no duty was imposed upon him to take control of the lands, rent them out and receive the rents and profits. Certainly this was the construction put upon the deed by the parties thereto, and it would be a harsh and unjust rule to now impose upon the trustee a liability for rents and profits of land of which he had no control and of which the husband of the plaintiff was, at the time of the execution of the deed, in possession, and remained in possession during the coverture, receiving the rents and profits. Whether the husband was the agent of the wife, as held in *Faircloth v. Borden*, 130 N. C., 263, we do not think it necessary to decide, as the non-suit removed this question from the record in this case.

We have carefully examined the authorities cited by the learned counsel for the plaintiff. In *Hicks v. Bullock*, 96 N. C., 164, the trustee is expressly directed to rent out the land and pay over the money arising therefrom to the *cestui que trust*. In *Allbright v. Allbright*, 91 N. C., 220, the controversy was as to which of the several persons for whose benefit the land was held was entitled to the rents and profits, the Court saying: "The donor manifestly intended to make some provision for his wife and all the children of his son James, and to have his son manage and control the property for, and only for, that purpose. He expected and required him to take care of, use and improve it in a way and manner most expedient and faithfully to that end while he should

live, and, having accepted the trust, he became obliged to do so." The deed in this case created an active trust. In *Barnes v. Barnes,* 104 N. C., 613, the trustee was directed "to hold the said lands and to allow the said Samuel W. Barnes and Margaret A. Barnes to have the rents and profits thereof for their own use and behoof, and further, that out of the said rents and profits to support the said Margaret Barnes in such a manner as she has heretofore lived." The only question presented was the manner in which the trustee should dispose of the rents and profits, so that out of the said rents and profits the said Margaret Barnes could be supported.

We concur with his Honor in the opinion that the defendant was not liable for the rents collected by the husband of the plaintiff.

The judgment upon this, the plaintiff's, appeal must be Affirmed.

MONTGOMERY, J., did not sit on the hearing of this case.

DRAKE v. HOWELL.

(Filed October 15, 1903.)

1. DEEDS—*Frauds, Statute of—Evidence—Parol Evidence.*

Standing trees are a part of the realty and are not the subject of parol conveyance, and any evidence thereof is not competent.

2. TRESPASS—*Possession—Damages.*

An action for trespass for cutting and removing timber from land cannot be maintained by one not in actual or constructive possession thereof.

3. ESTOPPEL—*Trespass—Possession—Deeds.*

Where, in an action for trespass in cutting timber, plaintiff failed to prove that he was in actual possession or that he had legal title to the trees, defendants were not estopped from denying plaintiff's title by two deeds by plaintiff and another, conveying the right to cut the timber to defendants, under one of which defendants' rights had expired by limitation before any attempt had been made to cut the timber, and the other never having been delivered.

4. TRESPASS—*Damages.*

The grantee of land cannot maintain an action for damages for a trespass committed before he became the owner thereof.

ACTION by J. C. Drake and others against S. D. Howell and others, heard by Judge *Frederick Moore* and a jury at September Term, 1903, of the Superior Court of HERTFORD County. From a judgment for the plaintiffs the defendant appealed.

George Cowper and *D. C. Barnes,* for the plaintiffs.
Winborne & Lawrence, for the defendant.

WALKER, J. This action was brought by the plaintiffs to recover damages for cutting and removing timber from a tract of land known as the Britt place. The land belonged to H. B. Parker, Sr., who, in 1899, conveyed it to his sons, H. B. Parker, Jr., and Fred. P. Parker. The plaintiffs alleged that they had purchased the standing timber on the land from H. B. Parker, Sr., "by a verbal contract." They introduced in evidence an agreement, in form of a deed, dated September 13, 1897, by which the trees on the Britt place were conveyed by the plaintiff J. C. Drake to S. D. Howell & Co., of which firm the defendant was a member, with the right to cut and remove the same within two years from said date, the consideration of this agreement being $250, of which

sum $200 was paid by the plaintiffs at the time the agreement was executed. The defendants never entered upon the land and did not cut any timber under the agreement. Plaintiffs then introduced a contract, in form a deed, dated June 21, 1900, between the plaintiff J. C. Drake and one H. B. Parker and the defendants S. D. Howell & Co., by which the same trees were conveyed to the defendants, with the right to cut the said timber within six months from the date of the contract. The consideration of this contract was the unpaid balance of the consideration of the first agreement and an additional sum charged for the timber, the total amount being $183.75. The plaintiffs claim that the latter contract or deed had not been delivered to the defendants, but that it was acknowledged by the plaintiff J. C. Drake and placed in the hands of one E. G. Sears, the justice of the peace who took the acknowledgment, to be delivered to defendants when the purchase money should be paid. There was evidence tending to show that the contract was sent to H. B. Parker, Jr., to be signed and acknowledged by him and returned to Sears, so that it might be delivered to the defendants when they paid the purchase money. Parker signed and acknowledged the paper and it was registered, the plaintiffs insisting that this was done in violation of the understanding and that the agreement or deed was in fact never delivered. The plaintiff Drake was permitted to testify, after objection by the defendants, that he bought the trees under a verbal contract from H. B. Parker, Sr., and gave him $300 for them. The defendants, within six months after the date of the last contract or deed, cut and removed the trees. There was no evidence that the plaintiffs had ever had actual possession of the land or timber.

The Court gave to the jury, among other instructions, the following: That if they believed the evidence the plaintiffs were the owners of the timber at the time the defendants cut

and removed it, unless the deed of June 21, 1900, was delivered. The defendants excepted to this instruction, and thus is presented the only question which we deem it necessary to consider.

The testimony of the witness Drake was incompetent, as the title to real estate or to any interest in or concerning the same cannot pass by parol. *McPhaul v. Gilchrist,* 29 N. C., 169; *Cox v. Ward,* 107 N. C., 511; *Presnell v. Garrison,* 121 N. C., 366; *Buckner v. Anderson,* 111 N. C., 577. It cannot be doubted that standing trees are a part of the realty and therefore are not the subject of parol conveyance any more than the land itself would be. *Mizell v. Burnett,* 49 N. C., 249; 69 Am. Dec., 744; *Green v. Railroad,* 73 N. C., 524. The evidence, therefore, should have been excluded, but this does not dispose of the appeal, as we must still ascertain whether there was any other evidence which, if believed by the jury, entitled the plaintiffs to their verdict.

The plaintiffs' action is, in substance and effect, one for trespass in cutting and removing the trees, and it was so treated in the argument before us. In order to recover in such an action the plaintiff must show that he was either actually or constructively in possession of the property at the time the alleged trespass was committed. There was no evidence of actual possession, and the plaintiffs are therefore driven to rely upon constructive possession. This they could have shown by proof that they had actually acquired the title from the true owner or that the defendants were estopped in some way to deny their title, for he who claims and establishes a title by estoppel is, as to those estopped, in the constructive possession of the property to which the estoppel relates, and may maintain trespass. *Phelps v. Blount,* 13 N. C., 177. In other words, the action of trespass being a remedy for an injury to the possession, it cannot be maintained by one who had not the possession at the time the

injury is alleged to have been committed (*Patterson v. Bodenhammer,* 33 N. C., 4); and in order to entitle one to maintain trespass when he had no occupation of any part of the property, he must in some way show a title in himself, from which the law can deduce that, constructively, he had the possession at the time of the alleged trespass. *Cohoon v. Simmons,* 29 N. C., 189. As we have held that the evidence which, as the plaintiffs claimed, tended to show that they had acquired title from the true owner of the property was incompetent, the plaintiffs can show title and constructive possession only in one other way—that is, by estoppel—and this they claim to have successfully done. In this connection they contend (1) that the defendants were estopped by the contract or deed of September 13, 1897, and that if this be not true, then (2) that they were estopped by the contract or deed of June 21, 1900. We do not think that they were estopped by either of these instruments.

In the first place, the agreement of September 13, 1897, had expired by its own limitation some time before the defendants entered upon the Britt land and cut the timber. The time fixed by that contract for cutting and removing the timber was two years, and this time had more than run out at the date of the alleged trespass. It is true that a party who accepts a deed poll is bound by its covenants and conditions, for if he claims the benefits of the deed he must also assume the burdens imposed by it. He cannot claim under it and against it. *Fort v. Allen,* 110 N. C., 183. But there as a well-settled rule in regard to an estoppel by deed, that even in the case of a strict estoppel as between the parties to the deed the estoppel is in its operation commensurate only with the interest or estate conveyed. *Staton v. Mullis,* 92 N. C., 623; *Fisher v. Mining Co.,* 94 N. C., 397. There is no evidence that we have been able to find in the record tending to show that the defendants ever entered upon the land

or cut any of the trees under this contract, and they certainly did not acquire any possession of the trees or any advantage over the plaintiffs in respect to them by virtue of the contract. Why, then, should they be estopped? *Robertson v. Pickerell,* 109 U. S., 609.

The plaintiffs contend, though, that if the defendants are not estopped by the agreement or deed of September 13, 1897, they are by the agreement of June 21, 1900. The jury have found that this instrument was never delivered by the plaintiffs, and that therefore it has never become a deed. An estoppel by deed cannot arise until the instrument which is claimed creates the estoppel has become effective as a deed. *Smith v. Ingram,* 130 N. C., 100. If the defendants were estopped, the plaintiffs were also estopped to deny that it was a deed, for estoppels must be mutual (*McDougald v. McLean,* 60 N. C., 120; *Ray v. Gardner,* 82 N. C., 146); and if the instrument had been delivered as the deed of the plaintiffs the acts of the defendants were lawful, and this action would not lie. If a party has acquired the possession of land by virtue of a deed or contract of purchase which he has accepted from the vendor in an action to recover the purchase money or in an action by the vendor to recover the land, he will be estopped to question the vendor's title. *Lacy v. Johnson,* 58 Wis., 422; *Smith v. Arthur,* 110 N. C., 400; *Dowd v. Gilchrist,* 46 N. C., 353. It would be inequitable and fraudulent for him to do so. But that is not the case we have here. Not only is there no deed by which he could be estopped, because the jury have found that there was no delivery, but there is no evidence that the defendants obtained the possession of the trees by virtue of the instrument which the plaintiffs claim operates as an estoppel. We do not well see why they should have taken possession under that instrument, as, under the circumstances, it would have been no protection to them. Again, the estoppel must be based upon the idea that the

plaintiffs had authorized the defendants to enter upon the land and cut the trees, while the plaintiffs are suing them as trespassers, thereby asserting that they entered without permission and in defiance of the rights of the plaintiffs.

There is an allegation in the pleadings that the plaintiffs have acquired the title to the Britt tract since this action was commenced, but this, if true, cannot help them, as a conveyance of title to the land after the defendants had committed the alleged trespass would not pass the right to the damages claimed by the plaintiffs. Such damages are personal to the owner of the property and do not pass to his grantees. *Liverman v. Railroad,* 114 N. C., 692.

It may be that the plaintiffs, if they are unable to succeed in the present form of their action, can, by amendment or a new action, recover the purchase price of the trees fixed by the contract of June 21, 1900, as a suit for the purchase money would be equivalent to a confirmation of the deed, which was delivered without the consent of the plaintiffs. *Smith v. Arthur, supra.*

The defendants allege that the Parkers claimed the purchase money under the contract of 1900. If the pleadings are amended and the defendants desire the Parkers to be made parties to the action, so that the rights of the respective claimants of the purchase money may be determined and the defendants relieved of a double charge for the same, they may perhaps obtain relief under section 199 of The Code before the amended answer is filed. Clark's Code (3d Ed.), 138.

Upon a review of the whole case, we think the Court erred in charging the jury that if they believed the evidence the plaintiffs were the owners of the trees, unless the deed of June 21, 1900, had been delivered, and for this error there must be another trial.

New trial.

HUDNELL v. EUREKA LUMBER CO.

(Filed October 15, 1903.)

1. LIBEL AND SLANDER—*Corporations—Agency—Non-suit.*

The facts in this action for slander are not sufficient to justify a recovery as against the defendant corporation.

2. LIBEL AND SLANDER—*Privileged Communication.*

Where defendant, on meeting plaintiff, stated to him that he should be careful how he spoke; that others had stated that he had committed perjury, and that defendant, as plaintiff's friend, had tried to stop the prosecution of plaintiff, and defendant alleged that such statement was made in the honest belief that he was performing a moral and social duty toward the plaintiff for his benefit, the statement was privileged.

3. LIBEL AND SLANDER—*Presumptions—Malice.*

Where defendant alleged that he had stated to plaintiff, in the presence of another, that plaintiff should be careful concerning his speech; that others had stated that he had committed perjury, and that defendant had endeavored to stop a prosecution against plaintiff in good faith, a requested instruction in an action for slander that such words were actionable *per se*, unless true, and that the law presumes malice, was properly refused.

ACTION by W. S. Hudnell against the Eureka Lumber Company and George T. Leach, heard by Judge *George A. Jones* and a jury at April Term, 1902, of the Superior Court of BEAUFORT County. From a judgment for the defendants the plaintiff appealed.

Shepherd & Shepherd and *E. S. Simmons*, for the plaintiff.

Rodman & Rodman and *Small & McLean*, for the defendants.

WALKER, J. This is an action brought by the plaintiff against the defendants, the Eureka Lumber Company and

George T. Leach, to recover damages for slander. It appears that several criminal prosecutions had been instituted before a justice of the peace against the lumber company for alleged violations of the "log inspection laws," and at the trial of those actions the plaintiff was examined as a witness for the State. He alleges in his complaint that the defendant Leach, referring to the said trial, uttered of and concerning him the following slanderous words: "You have perjured yourself, and unless you stop going down town and perjuring yourself we will prosecute you." The defendant, in the fifth section of his answer, denied that he uttered the words as alleged in the complaint, and averred that he said to the plaintiff, in the hearing of one John Lanier, who was casually present, the following: "It is said you committed perjury at the court-house yesterday, and they are talking about having you arrested, but I advised them not to do so, and I would advise you to be careful what you say." John Lanier, on his examination as a witness for the plaintiff, testified that the defendant said to the plaintiff, in his presence and hearing: "You be careful how you speak or talk down town; they say you committed perjury, and I, as a friend, tried to stop them from prosecuting you." There was much testimony tending to sustain the contention of each of the parties as to what was said by the defendant to the plaintiff in the presence of Lanier.

The defendant testified that he did not intend to charge that the plaintiff had committed perjury, but that he was acting in the protection of his own interest and as a friend of the plaintiff at the time; that he did not wish them to prosecute the plaintiff, and therefore uttered the said words in order to apprise the plaintiff of what had been said and to caution him and put him on his guard, and that what he said was intended only as a warning and as friendly advice. The defendant also pleaded justification. Two issues were submitted to the jury, as follows:

1. Did the defendant Leach falsely and maliciously speak of and concerning the plaintiff the false and defamatory words, as alleged in the complaint?

2. If so, what damage has the plaintiff sustained?

The jury answered the first issue "No."

The Court charged the jury, substantially, that if they found the words set forth in the complaint were uttered by the defendant in the presence and hearing of Lanier, the law implied malice, and they should answer the first issue "Yes," unless they found for the defendant on the plea of justification, and if they found that the words were not so uttered they should answer the issue "No"; that if they found the words were so uttered, but that the defendant was justified in uttering them, they should answer the first issue "No." The Court further charged the jury that if they found that the words were not uttered as stated in the complaint, but that the defendant used the words as stated by himself in the fifth section of the answer or as stated by Lanier, and that in using said words he did not intend to accuse the plaintiff of perjury, but only to inform him of what had been said and to warn and caution him in good faith of the reports that had been circulated about him, then they should answer the first issue "No." The Court charged the jury fully in reference to the second issue, but it is useless to refer more particularly to that part of the charge, as the jury answered the first issue "No," and therefore did not consider the issue as to damages. The plaintiff excepted to the charge of the Court upon the following grounds: Because the Court failed to state the contentions of the parties and to eliminate the material facts and apply the law to them. The plaintiff also excepted to the ruling of the Court by which a non-suit was entered as to the defendant company. We do not think that either of these exceptions should be sustained.

We have only given a bare synopsis of the Judge's charge,

which was full and clear and presented the matters in controversy in such a manner that the jury could not have misunderstood the real issues and the law applicable to the case.

It is true that a corporation may be liable for the slander of its agent, under certain circumstances (*Reddilt v. Mfg. Co.*, 124 N. C., 100), but we have carefully examined the record and have failed to find any evidence that brings the case within the rule of liability.

The plaintiff entered several other exceptions to the ruling of the Court, but we do not deem it necessary to consider but one of them, as the others are, in our opinion, without merit.

The plaintiff, in his ninth prayer, requested the Court to charge the jury as follows: "That the words set forth in the fifth section of the defendant's answer are actionable, *per se*, unless true, and the law presumes that they are false, and also presumes that they were spoken with malice, and that the burden of establishing their truth and removing the presumption of malice is upon the defendant; that he must fully satisfy the jury that the same are true and that the same were spoken without malice, by a preponderance of evidence. Failing in this, they should answer the first issue 'Yes.'" The Court refused to give this instruction, and the plaintiff excepted. In this connection the Court charged the jury that if they should find from the evidence that the defendant only said of and concerning the plaintiff "It is said you committed perjury at the court-house yesterday," and that two or three parties were talking about having him arrested, and he (defendant) had advised him not to do so, and had cautioned the plaintiff to be careful as to what he said, or had used words to that effect, and the defendant did not accuse or intend to accuse the plaintiff of perjury, but only to inform him as to what other persons had said concerning him, and that the defendant acted in good faith in what he said and did, the

jury should answer the first issue "No." To this instruction the plaintiff excepted.

If the defendant had charged the plaintiff with the commission of the crime of perjury without any qualifying words, what he said would have been actionable, *per se,* and the law would imply malice, and the Court so charged with reference to the use of the words set out in the complaint; but if the defendant had uttered the words in the honest belief that he had a moral or social duty to perform towards the plaintiff, he had what is called a qualified privilege to speak, and if he used the privilege in good faith and solely for the reason and purpose which conferred the privilege upon his statement, the law protects him. When this privilege exists the defendant must keep himself strictly within its limits if he would claim exemption from a recovery of damages in an action for the alleged slander; and if it appears that there was bad faith or malice on the part of the defendant in the use of the slanderous words, the defendant is stripped of his privilege and becomes liable to the plaintiff in damages, for the law will not permit the privilege to be used as a cloak under which to cover his malice. Newell on S. & L. (2d Ed.), pp. 389, 476, 477. It is not necessary that the duty which the defendant supposed he owed to the plaintiff should have been a legal duty or one of perfect obligation. It is quite sufficient if the words were spoken in the performance of a moral or social duty of imperfect obligation which he honestly believed that he owned to the plaintiff. Newell, *supra,* p. 389; Starkie on S. & L. (Folkhard's Ed.), secs. 670, 671, 672, 679. We think that this case falls within the principles laid down by the Court in *Adcock v. Marsh,* 30 N. C., 360. It was contended by the counsel for the plaintiff in that case that the communication made by the defendant, in which she charged the *feme* plaintiff with incontinence, was not a privileged one, as the defendant had no interest in the matter and stood in

no confidential relation to the person to whom the words were addressed, but that the defendant was in every respect a volunteer. But this Court held that if the communication was made in good faith and in the discharge of a moral or social duty, it was privileged. "The proper meaning of a privileged communication," says the Court, citing *Wright v. Woodgate,* 2 C. M. & R., 573, "is only this, that the occasion on which the communication was made rebuts the inference *prima facie,* arising from a statement prejudicial to the character of the plaintiff." And again: "Whenever the writer of a libel is acting under any duty, legal or *moral,* towards the person to whom he writes, his communication is a privileged one, and no action will lie for what is there written, unless the writer is actuated by malice." *Cockayne v. Hodgkisson,* 5 C. & P., 543. The Court further said that while Mrs. Marsh was not connected with the party to whom the words were spoken in the way of advice and caution, by any ties of consanguinity and did not have any personal interest in the matter, it was not necessary, in order to her protection, that she should have been so connected or interested, nor that the duty she undertook to perform should have been a legal one, or, in other words, one of perfect obligation. *State v. Hinson,* 103 N. C., 376; *White v. Nichols,* 3 How. (U. S.), 266. In the case last cited it is said that words spoken in confidence and friendship as a caution are privileged. We conclude, therefore, that if the defendant in this case acted in good faith in speaking to the plaintiff about the imputed charge of perjury for the purpose of protecting his own interest, or for the purpose of cautioning or warning the plaintiff, the words used by him were privileged.

Even if it be true, as contended by the plaintiff, that the charge of the Court in response to his ninth prayer for instructions was not as full and explicit as it might have been, we think it was sufficiently so to enable the jury to fully

understand the questions presented for their decision. We must infer from the charge, when read in connection with the evidence, that the jury found that the words as alleged in the complaint were not those used by the defendant in the presence of Lanier, and that they further found that if the defendant used slanderous words he was justified in doing so, or that the words were privileged, and that the defendant acted in good faith and without malice, and further, that he did not intend to charge that the plaintiff had committed the crime of perjury.

In the view we have taken of the case the Court should not have instructed the jury, as requested in the plaintiff's ninth prayer, that the words which the defendant alleged that he used were actionable *per se* and that the law presumed malice. The Court in its charge presented the case to the jury in accordance with the principles of law applicable to the facts (*Adcock v. Marsh, supra*), and, as we find no error in any other respect, the verdict and judgment must stand.

No error.

KERR v. HICKS.

(Filed October 15, 1903.)

1. REHEARINGS—*Appeal—Supreme Court Rule 53.*

Upon a rehearing the supreme court will not consider any point not certified as erroneous by counsel making the certificate.

2. APPEAL—*Exceptions and Objections—References.*

Where the plaintiff excepts to a compulsory reference, an objection taken for the first time on appeal to the technical form of asking submission of issues arising "on the report" instead of "on the pleadings" will not be considered.

PETITION for rehearing of this case, reported in 131 N. C., 90.

E. K. Bryan and *Stevens, Beasley & Weeks,* for the petitioner.

Shepherd & Shepherd, F. R. Cooper and *J. L. Stewart,* in opposition.

CLARK, C. J. This is a petition to rehear this case, reported in 131 N. C., 90. The grounds assigned in the petition are:

"1. That the Court overlooked the fact that the order of reference was compulsory and that the defendant excepted to the order of reference." Neither ground is valid as a statements of fact. The opinion was largely based upon the fact that the order of reference was compulsory and the defendant, according to the record, did not except to such order. The defendant merely excepted to the order of *Judge Brown* at a subsequent term amending the record to show that the plaintiff had excepted to the reference at the time it was made.

"2. That the Court was in error in holding that the issues submitted covered the plea in bar." The defendant's fourth assignment of error was that *Allen, J.*, refused to submit the third and fourth issues tendered by defendant. On this, we are satisfied with what is said on that point in our former opinion. "These matters could be and were presented to the jury upon the issues settled by the Court, and the refusal to submit the issues was not error." *Cecil v. Henderson,* 121 N. C., 244; *Patterson v. Mills, Ibid.,* 258; *Kendricks v. Ins. Co.,* 124 N. C., 315; 70 Am. St. Rep., 592. Besides, the issues were settled by the Court without exception from the defendant. The truth of the third issue tendered by the defendant, that defendant had sent plaintiff the accounts, was admitted by plaintiff; the fourth issue tendered, that "plaintiff had acquiesced therein," was the alleged plea in bar, and that matter was presented to the jury upon the issues submitted and was passed upon by them.

This last was the only point endorsed by the two other

counsel, whose certificate of error is a prerequisite to the submission of a petition to rehear, and therefore we should stop here and dismiss the petition. The defendant, however, earnestly pressed the further exception, not certified as error by any counsel, that "the Court was inadvertent to the fact that the cause was tried by *Allen, J.,* upon issues arising upon exceptions to the referee's report." In fact the cause was tried upon issues arising on the pleadings and exceptions, but if this last ground were properly before us we could not sustain the point for other reasons. The plaintiff was by the Constitution entitled to a jury trial. When the cause was compulsorily referred he reserved his rights by excepting thereto, and at the close of the reference he again excepted. Two juries have found in his favor, and on a full hearing here (*Kerr v. Hicks,* 131 N. C., 90), the judgment entered upon the last verdict (the first having been set aside in the discretion of the trial Judge) has been affirmed. This exception asks to set aside the action of both Courts and the verdict of the jury, and bind the plaintiff to the action of the referee, upon the ground that when the plaintiff made his second exception to the reference and demanded a jury (having previously excepted at the making of the reference), he asked for a jury trial upon "issues arising upon the referee's report," instead of "issues arising upon the pleadings," as required by *Driller Co. v. Worth,* 118 N. C., 746. That decision does not, however, rest upon such technicality, but upon the necessity of *specifying* clearly the issues upon which a jury trial is asked, but it is sufficient to say the defendant did not then except upon that ground. This was pointed out by *Furches, C. J.,* on the first hearing of this appeal, *Kerr v. Hicks,* 129 N. C., bottom of p. 145. It is fair to presume that had the defendant so excepted, the plaintiff would doubtless have conformed his prayer accordingly. All he wanted was a jury trial upon the matters in issue. The object of

requiring exceptions to be taken at the time is that there may be opportunity to correct errors without the expense of an appeal. On the contrary, the defendant not only acquiesced in the plaintiff's suggestion as to issues, but objected to evidence because it had not been introduced on the hearing before the referee. The plaintiff yielded and conformed to the defendant's views.

The plaintiff, who excepted in apt time to a compulsory reference, should not be deprived of his verdict and the affirmation by this Court of the judgment thereon, by objection taken for the first time in this Court to the technical form of asking issues arising "on the report" instead of "on the pleadings," when the other party took no exception at the time, but entirely acquiesced in that view, and all matters in dispute were in fact tried before the jury, and such ground of exception is not certified as error by either of the two counsel, whose certificate was a prerequisite to docketing the petition. The last reason of itself would preclude the allowance of that ground for rehearing, even if the exception had been taken on the trial. Rule 53 requires that the certificate of counsel shall state "in what respect" the former opinion "is erroneous." This must be complied with, both because the rules are mandatory and the other side is entitled to know the grounds on which he must contest.

Petition dismissed.

FOLB v. FIREMEN'S INSURANCE CO.

(Filed October 20, 1903.)

INSURANCE—*Premiums—Payments—Fire Insurance.*

The taking of clothing by the agent of a fire insurance company in part payment of the premium of a policy is a fraud upon the company, and no valid contract as to the company arises from such a transaction.

ACTION by Mike Folb against the Firemen's Insurance Company of Baltimore, heard by Judge *C. M. Cooke,* at February Term, 1902, of the Superior Court of CUMBERLAND County. From a judgment for the defendant the plaintiff appealed.

H. L. Cook, N. A. Sinclair and *E. G. Davis,* for the plaintiff.

S. H. McRae and *Rose & Rose,* for the defendant.

CONNOR, J. Plaintiff testified that he was engaged in business as a clothing merchant in Fayetteville, N. C., in 1901 and 1902; had one store which he called the Boston Clothing Store. That he was solicited by John Underwood, defendant's local agent, to give him some insurance in defendant company. That he finally told Underwood that he would take a policy of two thousand dollars on his stock in the Boston Clothing Store. That agent said he would place his insurance in defendant company. This was about the 6th November, 1901. Agent told him afterwards that he had written the policy in said company upon the stock of goods and had it in his office in the safe. The policy covered clothing, gent's furnishing goods, etc. That he had no other insurance on that stock. Early in January, 1902, said store was

destroyed by fire. The value of the stock at the time of the fire was $5,500. The damage by fire and water was $1,647.90. That he notified defendant's agent. That he did not pay the $34 the very time he agreed on the contract of insurance. That a few days afterwards he paid it by letting said agent have some clothing out of the store to the amount of about $20, and the balance in money. That it was cold weather when he paid agent for the insurance and he said he needed some clothes and he would as leave buy them from plaintiff as any one else, and as he had given him the insurance he would take part payment in clothing. He took a suit of clothing for himself and perhaps some other articles. Plaintiff paid the balance in money. Mr. McRae, agent for the company, notified plaintiff that the company would not recognize any liability. No policy of insurance was ever produced, nor was there any evidence that any policy was ever issued, nor that the defendant had any notice of the transaction until after the fire. There was evidence in regard to the proof of loss after the fire. Upon this testimony plaintiff rested. The defendant moved for judgment of non-suit. This motion was allowed and plaintiff appealed.

We are of the opinion that there was no error in his Honor's ruling. It is clear that the agent had no authority to accept merchandise in payment of the premium.

"In the absence of any special agreement, the insurance premium must be paid in money. Unless objected to, currency, or even checks, drafts or bills of exchange, will constitute payment; but the agent will not be presumed to have authority to accept merchandise on personal account. The distinction between the agent and his principal should be kept in view. The premium on a policy of insurance is the property of the latter and not of the former. Where the agent delivers a policy to the merchant with whom he has dealings and to whom he is indebted for goods due for the use of his

family, and the premium by agreement is placed to the credit of the account, it is a fraud on the principal, and should a loss occur, the agent having failed to remit, the insurer will not be liable. The agent cannot appropriate to his own use the funds of his principal without a wrong being done the latter; and when merchandise is accepted in payment, or the premium is applied to pay a debt due to the insured, the latter becomes a party to the wrong and the company will not be bound." Ostrander on Insurance (2 Ed.), p. 295. The same doctrine is laid down in Kerr on Insurance, p. 294, citing *Hoffman v. Ins. Co.*, 92 U. S., 161.

Mr. Justice Swayne says: "Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies. * * * If the agent had the authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands and do everything else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking. The exercise of such a power by the agent was liable to two objections—it was *ultra vires*, and it was a fraud as respects the company. * * * No valid contract as to the company could arise from such a transaction."

These authorities are conclusive and fully sustain his Honor's judgment.

No error.

ROBINSON v. McDOWELL.

(Filed October 20, 1903.)

1. LIMITATIONS OF ACTIONS—*Assignments for the Benefit of Creditors—Payments—Trusts.*

Part payment by an assignee in bankruptcy of a debt referred to in the assignment does not arrest the running of the statute of limitations against the debt.

2. LIMITATIONS OF ACTIONS—*Assignment for the Benefit of Creditors—Trusts.*

Where it is discretionary with the trustee in a deed of trust as to the time of the sale of property therein assigned, the same may be sold, though the debts secured are barred by the statute of limitations.

3. LIMITATIONS OF ACTIONS—*Assignments for the Benefit of Creditors—Executors and Administrators.*

A personal representative cannot sell land to pay debts barred by limitation.

4. HOMESTEAD—*Assignments for the Benefit of Creditors—Limitations of Actions.*

The assignee in an assignment for the benefit of creditors, the grantor in the assignment having retained his homestead, may, upon the death of the grantor, sell the homestead to pay the debts, though such debts are barred by limitation.

5. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Executors and Administrators—Parties—Special Proceedings.*

Where the grantor, after making an assignment for the benefit of creditors, dies, his personal representative and the trustee may join in a special proceeding before the clerk to sell the real estate to pay debts.

6. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Executors and Administrators.*

Where the trustee in an assignment for the benefit of creditors and the administrator of the grantor, having joined in a proceeding to sell land, allege that the grantor died seized of the land in fee, the title of the purchaser is not affected thereby.

ACTION by Newton Robinson against Alex. McDowell and others, heard by Judge *C. M. Cooke* and a jury, at March Term, 1903, of the Superior Court of BLADEN County. From a judgment ordering the sale of certain land both plaintiff and defendant appealed.

PLAINTIFF'S APPEAL.

On the 16th of March, 1888, John A. McDowell, of Bladen County, executed a deed of trust to C. M. McLean for the benefit of his creditors. A large amount of both real and personal estate was conveyed in the deed, and the creditors were arranged in three classes, the third class embracing all of his creditors except those whose debts were first preferred and those in the second preferred class. Newton Robinson (the administrator of McDowell, who died in 1899, and one of the plaintiffs in this action) and Thomas J. Norman are creditors of the first class. In the preamble of the deed of trust it was declared that the grantor was indebted to various persons in divers amounts of money, which he was unable to pay, and that he was willing to assign all of his property for the benefit of his creditors. Then there followed a conveyance to the trustee of all the real estate and personal property "except such as is by law exempt from sale under the execution, to-wit, his homestead and personal property exemptions." The homestead and personal property exemptions were assigned and allotted in December, 1889. There was evidence offered by the plaintiffs to show that in 1893 the grantor, hav-

ing become dissatisfied with the trustee, McLean, because he had sold one of the tracts of land embraced in the deed of trust for less than the grantor thought it was worth, agreed with the trustee McLean, and Robinson and Norman, that J. F. Melvin, who was then the Clerk of the Superior Court of Bladen County, should be substituted as trustee in the place of McLean; that another deed of trust was drawn up and executed by McDowell and McLean (in which McLean conveyed all of his rights under the first deed); that the deed of 1893 embraced the same property conveyed in the first deed, except the tract which had been sold by McLean, and contained the same provisions contained in the deed of 1888; that the deed of 1893 was registered in the office of the Register of Deeds of Bladen County, and the original registration and deed were both burnt in a fire which consumed the courthouse. John A. McDowell died in January, 1899, the owner of other real estate than that conveyed in the deeds of trust, and Newton Robinson within a few days was qualified as his administrator.

The trust being unexecuted and the debts unpaid, the administrator, Robinson, filed a petition in the Superior Court of Bladen County (before the Clerk) to sell the real estate of the intestate to make assets for the payment of his debts. McLean and Melvin joined in the petition for the purpose of conferring on the administrator the legal title to the real estate conveyed in the deed, and under the order of the Court to have administered by the administrator the proceeds of the sale of the land conveyed in the deed in the payment of the debts of the intestate, according to the terms of the trust deed. The debts due to Robinson and secured in the deeds of trust consisted of three notes, two of them under seal and due in 1884, and one a simple promissory note due in 1885.

C. C. Lyon and *J. D. Shaw, Jr.,* for the plaintiff.
R. S. White and *E. K. Bryan,* for the defendants.

MONTGOMERY, J., *after stating the facts.* The only payments ever made upon the notes due by McDowell to Robinson were made by G. F. Melvin, the assignee in the deed of trust of 1893. The assignee was not authorized in the deed of trust by the grantor to make any promise to pay the balance of the debt upon any payment made by him or to revive the debt after the same might become barred by the statute of limitations. He was the agent of the grantor, according to the provisions of the deed of trust, to perform such duties as were imposed upon him in the deed, viz., to sell the property and apply the proceeds in the manner directed. A payment, therefore, by the assignee, did not have the effect of arresting the running of the statute of limitations against Robinson's debts. *Battle v. Battle,* 116 N. C., 161.

The statute of limitations having been pleaded by the defendant against the debts of Robinson, the jury properly found under the instructions of the Court that those debts were barred. But that did not affect the security contained in the deed of trust for the payment of those debts. There was a provision in the deed under which the trustee was given discretion as to the time, place, manner and terms of the sale of the property embraced in the deed. And if that had not been so, if the deed had contained only a power of sale without limitation as to time of sale, the power of the trustee to sell and apply the proceeds of the sale to the debts would not be destroyed, because the debts secured might be barred by the statute of limitations. *Menzel v. Hinton,* 132 N. C., 660, and cases there cited. The property, therefore, conveyed in the deed of trust was, and is, a security for the debts, though they might be defeated by the plea of the statutory bar, so far as the personal liability of the debtor is concerned. There

was no error in that part of the judgment, therefore, which decreed that no part of the land of the intestate, other than that conveyed in the deed of trust, could be sold to pay the Robinson debts. His Honor held, however, that the Robinson debts were barred by the statute of limitations as to the reversions in the homestead of the grantor, and in the judgment of the Court it was adjudged that no part of the proceeds of the sale of the reversion in the homestead interest should be applied to the Robinson debts. When that judgment was rendered his Honor followed the law as it had been declared by this Court in *Joyner v. Sugg,* 131 N. C., 324; but since that time the case of *Joyner v. Sugg* has been reheard and the former judgment reversed. His Honor simply followed our error, and in his ruling there was error, and the opinion of the Court below on that point is reversed.

The homestead has fallen in by the death of the homesteader, and the tract of land will be sold, as if the homestead had never been allotted, and the Robinson debts will come in for their proper share of the proceeds.

Affirmed, except as to the reversal of that part of the judgment concerning the reversion of the homestead as above pointed out.

DEFENDANTS' APPEAL IN SAME CASE.

MONTGOMERY, J. The defendants insisted that the Court below erred in not dismissing the action, because of a want of jurisdiction, that is, that because of the uniting of the trustees with the administrator in the petition to make real estate assets, the Clerk did not have jurisdiction of the matter, and that therefore the Superior Court, on the case being sent to that Court from the Clerk for trial, did not have jurisdiction. In the case of *Roseman v. Roseman,* 127 N. C., 494, and cases there cited, it is difficult to understand the excep-

tion of the defendant to dismiss the action on the ground assigned. The defendants' exception to the uniting of the administrator and the trustees, McLean and Melvin, and to the introduction of the deeds of assignment as evidence in the case, ought not to be sustained. We think it commendable that the trustees and the administrator should have jointly commenced this proceeding, for it is almost certain that time and expense have been saved, and that the property will sell for a better price under the direction and order of the Court in this case than it would have brought if the administrator had sold the equity of redemption and the trustees or either one of them had sold the property under the deed of trust.

There is no merit in the ground taken in the defendants' brief that the deeds of trust and the rights of creditors under them were destroyed because of an allegation in the petition that the intestate was seized in fee-simple of the lands described in the petition, embracing those conveyed in the deed, and an admission of that allegation by the defendants. The whole pleadings go to show that the deed of trust was to be respected in its provisions as to the application of the proceeds of the sale of the land conveyed therein, and the allegation that the fee-simple title was in the intestate was simply made to show that the title to the property would be complete and the entire interest in the land would be conveyed under the order of sale prayed for by the petitioners. The defendants' contention is too highly technical for adoption.

From our point of view it makes no difference whether the deed of trust of 1893 was valid or not. Either that or the one one of 1888 was valid, and the trustees named in both are parties to this proceeding. It appears from the *defendants'* statement of the case on appeal that both McLean and Melvin were parties plaintiff; but in the plaintiff's appeal McLean does not seem to be a party. If he is not, it will be well for the plaintiffs to bring him in by amendment. In the judg-

ment it appears that Newton Robinson is appointed a commissioner to sell the land for cash, etc. Before that sale is made the commissioner must be required to file a proper bond in a sum double the value of the property to be sold, conditioned for the faithful discharge of his duty in making the sale and in applying the proceeds. This must be done, that the creditors may feel as secure in the sale of the property by the Court as if the sale had been made by one of their own choice.

No error.

WATSON v. SEABOARD AIR LINE RAILROAD CO.

(Filed October 20, 1903.)

1. DAMAGES—*Negligence—Personal Injuries.*

On the question of damages for personal injuries it is not error for the trial court to refuse to charge that they should deduct from the earning capacity losses from sickness, railroad accidents and time not employed.

2. DAMAGES—*Negligence—Personal Injuries.*

To aid the jury in arriving at the present value of the earning capacity of a person killed, the trial judge should give a mathematical rule for computing the same.

3. ISSUES—*Damages—Negligence—Personal Injuries.*

In an action for the death of plaintiff's decedent, the issues "What was the expectancy of life of plaintiff's intestate?" and "What would have been his accumulation arising from his net income for that period?" should not be given in lieu of the issue "What damage is the plaintiff entitled to recover?"

ACTION by A. S. Watson against the Seaboard Air Line Railway Company, heard by Judge *H. R. Bryan* and a jury, at April Term, 1903, of the Superior Court of WAKE County. From a judgment for the plaintiff the defendant appealed.

T. M. Argo, for the plaintiff.

T. B. Womack and *Day & Bell,* for the defendant.

MONTGOMERY, J. This action was brought by the plaintiff's administrator to recover damages against the defendant upon the allegation that his intestate was killed through the negligence of the defendant. By agreement the issue as to the negligence of the defendant was answered by the Court in the affirmative, and the only matter brought up by the appeal arises upon the refusal of his Honor to submit certain issues and to give certain instructions tendered and requested by the defendant upon the measure of damage.

The plaintiff requested the Court to instruct the jury as follows:

"3. After determining the earnings of the deceased you must deduct from that amount the cost of his personal support, including his board, lodging, clothes, doctor's bill, if he should get sick, loss of time from sickness, if he should become sick, loss of time from railway accidents, if such should not occur from the negligence of the railroad or his fellow servants, and any sum he should spend for his personal comfort over and above his necessary expenses, and his failure to find employment at any time, if such failure should occur; these last sums you will deduct from his earnings, and net amount left you will ascertain. This will be his net income. You will not give this amount, but will give such a sum only as will equal the present value of that net income."

The instruction was properly refused. It could not have been possible to produce evidence to show how often or how long the plaintiff's intestate might have been sick, how many times he might have been injured in railroad accidents, or how long and how often he might have been out of employment, so that the jury might form an estimate of how much should be deducted from the intestate's gross earnings. No

such calculation in dollars and cents could have been made by the jury about matters so uncertain and so incapable of proof, and therefore the jury could not deduct any specific amount on account of those matters from the gross earnings of the intestate. Those matters, however, were proper subjects for the consideration of the jury in estimating the probable earnings of the intestate; and his Honor instructed them that they should consider the intestate's strength, his health, his physical condition, his habits of life and the dangers attending his occupation, that of an engineer, and the effects of his occupation upon his health. He also instructed them that they should consider and make allowances for the expected and natural lessening of his capacity to earn money by reason of his increasing years.

The defendant further asked the Court to instruct the jury: "You will ascertain the present value of such net income or accumulation by first ascertaining what one dollar, interest at six per cent., will amount to for the time you have found that the plaintiff's intestate would have lived. Then you will divide the net income by the amount you have found $1.00 and interest for such time to amount to, and the amount thus ascertained will be your answer to the second issue."

In *Benton v. Railroad,* 122 N. C., 1007, this Court sustained the charge of the Court below, which was as follows: "The measure of damages for loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditure from his net gross income, and then estimating the present value of the accumulation from such net income, based upon his expectation of life. In applying this rule to the facts in this case, and to enable the jury to properly estimate the reasonable expectation of pecuniary advantage from the continuation of the life of the deceased, they should consider his age,

habits, industry, means, business qualifications, skill, and his reasonable expectation of life."

In the present case his Honor instructed the jury in those very words, and the charge is again approved. We think, however, that, as illustrative of the rule, and with a view of making the method of calculating the present value of the net accumulations clearer to the jury, they might have been given the mathematical rule requested by the defendant, which is the correct rule, with advantage to the jury. The principle of the established rule would not have been altered or varied, but the additional instruction would have afforded the jury a mathematical rule of arriving at the proper result.

The defendant tendered the following issues, "What was the expectancy of life of the plaintiff's intestate?" "What would have been his accumulations arising from his net income for that period?" in lieu of the second issue tendered by the plaintiff and adopted by the Court, "What damage is the plaintiff entitled to recover?" His Honor properly refused to submit the tendered issues in lieu of the second issue submitted by the Court. If they had been submitted along with the second issue, it would not have been error, although they were not necessary issues. The answers might have been to some extent cumulative as to the response to the second issue, but they would have shown whether the jury understood the instruction of the Court when taken in connection with their response to the second issue: "What damage is the plaintiff entitled to recover?" If the two issues tendered by the defendant had been submitted without the second issue, then it would have become necessary for his Honor or the Clerk to have made the calculation and returned the verdict. That would have been a usurpation of the office and duty of the jury, and could not have been allowed.

No error.

FARMERS MANUFACTURING CO. v. STEINMETZ.

(Filed October 20, 1903.)

1. EVIDENCE—*Pleadings—Appeal.*

Where the trial judge allows a party to introduce in evidence certain parts of the pleadings of the opposite party, the latter may himself introduce so much of his own pleadings as may be necessary to explain any admission in the part offered by the other party, and the amount allowable is discretionary with the judge, except in case of palpable abuse.

2. ATTACHMENT — *Judgments — Ancillary Proceedings — The Code, sec. 370.*

Where ancillary proceedings of attachment are brought with the main action, and the attachment is not discharged, it is not error to condemn the attached property for sale to pay the judgment, as the sheriff would be required to sell the same upon issuance of execution.

ACTION by the Farmers' Manufacturing Company against C. M. Steinmetz, heard by Judge *R. B. Peebles* and a jury, at February Term, 1903, of the Superior Court of DUPLIN County. From a judgment for the plaintiff the defendant appealed.

Carlton & Williams, for the plaintiff.

Simmons & Ward, J. A. Gavin, Jr., and *Stevens, Beasley & Weeks,* for the defendant.

CLARK, C. J. This was an action to recover an alleged indebtedness with ancillary proceedings of attachment against the defendant as a non-resident. There are but two exceptions:

1. The defendant having offered in evidence the third paragraph of the complaint, the plaintiff was allowed to offer the

rest of the complaint over the defendant's exception. In *Spencer v. Fortescue,* 112 N. C., 269, it is held that the whole admissions in the pleadings must be taken together; therefore, where in an action upon a note the plaintiff offered part of the defendant's answer admitting the debt, it was proper to admit as evidence for the defendant the other part of the answer qualifying such admission—quoting 1 Greenleaf Ev. (14 Ed.), 201. The rulings are uniform that the pleadings are not evidence unless introduced as such, *Smith v. Nimocks,* 94 N. C., 243; *Greenville v. Steamship Co.,* 104 N. C., 91; that merely reading the pleadings before the jury does not put them in evidence, *Smith v. Smith,* 106 N. C., 498; that a party can put in evidence part of his antagonist's pleadings, *Gossler v. Wood,* 120 N. C., 69; that while a party cannot introduce his own pleadings as evidence for him, they being merely his declarations in his own interest, *Austin v. King,* 91 N. C., 286, yet when the adverse party has introduced part of one's pleadings, he can then introduce himself so much of the rest of his pleadings as may be necessary to explain any admission in the part put in evidence by his opponent, *Spencer v. Fortescue, supra.* How much of a party's own pleading may thus be introduced as explanatory is a matter for the presiding Judge, except in case of palpable abuse or when it appears that material damage was caused by the admission of more of a party's own pleading than was necessary in explanation. The jury understand that it is the party's own declaration, and not proof, and that it is only offered to prevent his being prejudiced by the previous introduction of a part of his pleading as an admission and to explain it. We do not see that such harm was done here.

2. The second exception is that "the plaintiff offered no evidence as to the allegations in the affidavit and application for attachment, and no issue was submitted as to them. The Court, after the verdict, inspected the sheriff's return on the

warrant of attachment and entered as part of the judgment the following words: 'And it appearing that certain property was levied on by an attachment issued in this action, which will appear by reference to the sheriff's return, it is further considered and adjudged that said property be and the same is hereby condemned to pay said judgment, interest and costs of this action, and that a *venditioni exponas* issue directing a sale of said property for that purpose.'" The defendant, in an affidavit in the cause, denied that he was a non-resident, and alleged that he was only temporarily absent from the State. He entered, however, a general appearance; he did not move to dissolve the attachment and tendered no issue as to non-residence, and did not except to those submitted. The attachment is simply a levy before judgment, and upon execution issuing on the judgment it is the duty of the sheriff to sell the attached property. The Code, sec. 370; *Gamble v. Rhyne,* 80 N. C., 183. In some States it has been held that a personal judgment, unaccompanied by an order for sale of the attached property, will effect a dissolution of the attachment. 3 Am. & Eng. Enc. (2 Ed.), 242, and cases cited. That point does not seem to have been decided in this State, but if, as the defendant contends, such order need not have been embraced in the judgment, he has suffered no detriment.

No error.

DUFFY v. WILLIAMS.

(Filed October 20, 1903.)

1. GUARDIAN AND WARD—*Expenditures—Clerks of Courts—The Code, secs. 1566-1568.*

A court of equity may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk of the court.

2. GUARDIAN AND WARD—*References—The Code, sec. 1590—Acts 1891, ch. 83—Legal Conclusions.*

A finding by a referee that a guardian rented the lands of the ward privately, and that the interest of the ward did not require a public rental thereof, is a conclusion of law. The referee should have found whether any injury came to the ward by the private rental.

ACTION by Rodolph Duffy, Solicitor, on behalf of Annie R. Williams against W. H. Williams, heard by Judge *H. R. Bryan,* at December Term, 1902, of the Superior Court of DUPLIN County. From a judgment for the defendant the plaintiff appealed.

Stevens, Beasley & Weeks and *Faison & Grady,* for the plaintiff.

Rountree & Carr and *W. T. Dortch,* for the defendant.

MONTGOMERY, J. The referee found as a fact that the guardian, for the maintenance of his wards, had expended, without an order of Court, a greater amount than the income of their estate, but that the expenditures were reasonable and necessary, and that as a matter of law he should be allowed in his settlement with the wards such amount as he had paid out of the capital of the estate. The affirming of

these findings by his Honor and the defendant's exception thereto constitute the most serious question raised by the appeal.

The defendant, W. H. Williams, Jr., in 1888, was appointed and qualified as guardian of James M., Florence H., Annie R., John E. and Stella Williams, infant children of J. M. Williams, his deceased brother. The evidence tends to show that the real estate of the wards was worth about $14,000, and that the guardian received about $5,000 in money belonging to the estate; that the Williams family was a most respectable one, was possessed of considerable property and of good social position; that the oldest child at the time of the appointment of the guardian was about twelve years of age, and the youngest between three and four; that through about ten years of the guardianship the wards were kept in the home of their uncle, the guardian, and received his care and attention as well as that of his wife, and were at the close of his guardianship well reared, of good manners and fair educational advantages. That part of the *corpus* of the estate which consisted of money, $5,000, had been used by the guardian in those expenditures.

We have numerous decisions of our Court, from that of *Long v. Norcom,* 37 N. C., 354, down to and including that of *Tharington v. Tharington,* 99 N. C., 118, in which it is laid down as a *general rule* that expenditures by a guardian of a larger amount of the ward's estate than the income arising therefrom for the maintenance and education of the wards will not be allowed by the Courts; and that the Courts will show less favor to the guardian who has already made such expenditures of his own before he has asked the authority of the Court to do so. But it has never been held that these rules are so hard and fast as to admit of no exceptions. The act of 1762, ch. 62, on the subject of Guardian and Ward, in its 25th section, contains a reservation in the court of equity

of their former jurisdiction in matters and things relating to orphans and their estates; and in *Long v. Norcom, supra,* it is said "the County Court may not be authorized under the act of 1762 to do more than apply the profits of one year to the deficit of a preceding year; but the court of equity has power—though it may be seldom willing to exercise it—to take capital itself and apply it for maintenance, either future or past." The powers which the court of equity then had and exercised are now conferred upon the Clerk of the Superior Court, in The Code, secs. 1566, 1567 and 1568. If the guardian, then, in the present case, had received from the Clerk of the Superior Court an order authorizing and directing him to use a part of the capital of his ward's estate, the expenditure would have been legal and proper. The question, then, is, as it was in *Long v. Norcom, supra,* whether the guardian shall be allowed such disbursements as were deemed to be proper, or whether they shall be disallowed upon the single ground that the guardian did not obtain the authority of the Court before he made the expenditures.

We are of the opinion that if the Court had the power to authorize these expenditures to be made, and we have seen that the court of equity formerly had such power, and that the Clerk of the Superior Court now is possessed of that power, the Court could allow the guardian the amount of such *past* expenditures. The referee in this case has found from the evidence that the amount expended by the guardian was necessary to maintain the wards and to give them that degree of education necessary to their station in life. The wards could not be sent to the charitable institutions of the county for support, because the wards owned a large amount of property, and under such circumstances as appear in the case, if it has ever been held by the Courts of this State, that a ward should be put out as an apprentice, then we think the rule should be modified and altered. If the wards, then,

should not have been put out as apprentices and could and would not have been received for support by the county as paupers, then the income of the estate not being sufficient to furnish maintenance for the wards, the guardian had no choice but to use a reasonable amount of the capital for such support and maintenance; and the report of the referee allowing the same as reasonable and necessary was proper, and there is no error in that part of the judgment of the Court below in affirming that finding of the referee.

The referee in his fourth finding of fact found that the guardian did not rent the lands of the wards at public rentings, but that he rented them privately; "and that the best interest of the wards did not require a public rental of their lands." That finding was affirmed by his Honor and the defendants filed an exception. The defendant's contention is that the latter words of the finding of fact was in reality a conclusion of law, and we are of that opinion also. The Code, sec. 1590, and the amendment thereto in the acts of 1891, ch. 83, impliedly declare it to be to the interest of the wards to rent the lands publicly. If, upon the evidence, the referee had made a finding that although the rentings of the lands by the guardians were private, yet no injury had come to the wards, then there would be nothing in the exception. There was evidence before the referee to the effect that the lands should have brought and were worth more as rent than the guardian reported and was charged with, and therefore there should have been a finding on that question. That exception is sustained. The exception to the 5th finding of fact and the 6th conclusion of law of the referee, both affirmed by his Honor, must also be sustained. Those findings of the referee are so uncertain as to amount to no finding, and by their very words leave the matter open. The case is remanded to the end that the matter of rent of the ward's land and the Bradham transaction referred to in the 5th finding of fact and the 6th

conclusion of law may be proceeding with according to law. The costs to be divided between the parties.

Modified and affirmed.

HODGES v. LIPSCOMB.

(Filed October 20, 1903.)

PARTIES — *Remainders — Contingent Remainders — Sales — Life Estates—Acts 1903, ch. 99—The Code, sec. 1325.*

In an action for the sale of land for re-investment, in which there are contingent interests, it is sufficient to make parties those who would, by the happening of the contingency, have an estate therein at the time of the commencing of the action; and where the remainder may go to minors or persons not *in esse* or unknown, the court may appoint a guardian *ad litem* to represent such parties.

ACTION by Samuel Hodges and others against James Lipscomb and others, heard by Judge *G. S. Ferguson*, at September Term, 1903, of the Superior Court of WILSON County.

Civil action, brought for the purpose of selling certain lands for reinvestment under the provisions of chapter 99, Laws 1903. The land ordered by the Court to be sold for reinvestment was devised by the testator to his adopted daughter, Minnie, for life, "and at her death to such child or children as she may leave surviving her, and if any of said children shall die, leaving issue, prior to the death of said Minnie, in that event such issue shall represent and take the share of its immediate ancestor." Another piece of land was given to testator's adopted daughter, Bettie, for life, with remainders over in the same terms used above.

The ultimate remainder is in the following words: "If both the said Minnie and the said Bettie shall die, leaving no child or children, nor the issue of any child or children, living at their death or the death of the survivor, then and in that event I direct that my entire estate shall be divided equally between my heirs at law and distributees and the heirs at law and distributees of the said Minnie and Bettie, claiming and entitled through their mother." A full recital of the limitations will be found in the former case, 128 N. C., 57.

The said Minnie and Bettie and their children and grandchildren are the plaintiffs in this action. They have made parties defendant all those collateral heirs at law and distributees of the said Minnie and the said Bettie and of the testator who would be their respective heirs at law and distributees if the contingency should happen now, and they have sought to make all other persons who in any contingency would become interested in said land parties to this action through a guardian *ad litem* appointed by the Court for that purpose on motion of plaintiffs.

From a judgment for the plaintiffs the defendants appealed.

Womack & Hayes and *Connor & Connor,* for the plaintiffs.

F. A. & S. A. Woodard, for the defendants.

CLARK, C. J. (after stating the facts). All the facts alleged in the complaint are admitted in the answer, and that a sale of the land described in the complaint will be beneficial not only to the plaintiffs but to the defendants, the contingent remaindermen, if the interests of the defendants can be protected by the decree, and the purchasers assured of a good title. This will was passed upon by this Court in *Hodges v. Lipscomb,* 128 N. C., 57, and it was held that the Court had no

power to order a sale with the parties then before the Court. In this action additional parties have been made, and summons has been issued against all the parties *in esse* who would be contingent remaindermen if the contingency should occur at the date of the summons. An affidavit was filed containing, among others, the following averments: "That the defendants named in the summons, which has been issued in this action, are the persons to whom said real estate would go at this time if the said Minnie and Bettie should now die without leaving any child or children, or the issue of any child or children, surviving the said Minnie and Bettie." "That it is impossible for affiant to say what other persons may become interested in said lands, for that it is impossible for him to fix the time of the death of the said Minnie and Bettie without any children surviving or the issue of such children, or whether at such time any or all of the defendants may be living or not, or who their respective heirs will be, for which reason this affiant avers that the names and residences of the other persons who may become interested in any contingency in said lands are unknown."

Upon motion of the plaintiffs the Clerk of the Court caused publication to be made of the summons for four weeks in a newspaper published at the county-seat, together with a concise statement of the purposes of the action, and directing the defendants "and all others who in any contingency may become interested in the said lands" to appear at the succeeding term of said Court and "answer, demur or otherwise plead to the complaint; otherwise the relief therein demanded will be granted." The plaintiffs alleged in their complaint that "it is impossible for the plaintiffs to allege who are the persons who may become interested in the said lands under the terms and conditions of said will, for that it is impossible for them to fix the date of the death of the said Minnie D. Hodges and the said Bettie E. McDaniel,

without child or children or issue of said child or children. But that the plaintiffs have applied to this Court for the appointment of a guardian *ad litem* and representative for the said unknown persons who may, in any contingency, become interested in the said lands, and who are not otherwise made parties hereto and properly represented herein."

At the appearance term the Court appointed a guardian *ad litem* for such unknown persons as prayed. Answer was duly filed by such guardian *ad litem,* admitting the facts set out in the complaint and submitting to the judgment of the Court. Judgment was rendered appointing a Commissioner to receive bids for a lot of land described in the complaint, and to report these bids to the Court for its further direction as to sale and reinvestment of proceeds.

The plaintiffs insist that this proceeding constitutes a compliance with the provisions of section 2, chapter 99, Laws 1903. The only respect in which it is supposed there is a defect is that there was a failure to secure personal service of summons upon the heirs at law of the brothers of the grandfather of Minnie D. Hodges and Bettie McDaniel, if there are any such now in being.

The history of judicial decision on this subject is exhaustively given by the Court in the case of *Springs v. Scott,* 132 N. C., 548. It is there very conclusively shown that the State of North Carolina is out of harmony with the Courts in other jurisdictions, and it was the evident purpose of the Legislature in the passage of the act of 1903 to bring our law into accord with that prevailing elsewhere. If that act requires more to be done than has been done in this case it will require a practical impossibility and leave our law almost where it was before. The appellants' construction that summons must be served personally on all persons *in esse* who, in any contingency, however remote, might have an interest in the land, would require the formation of a family tree

reaching back into the unknown past, and bringing it down through its various branches to the present time, for it is possible that all the heirs at law of any one propositor in the past might become extinct, thereby carrying the descent over to the most remote collateral relatives. This cannot be the purpose of the law. The statute is a remedial one. A known grievance existed, and it was the purpose of the Legislature to give a remedy where none was provided by law.

The large number of decisions in which *Watson v. Watson,* 56 N. C., 400, has been cited, twenty-one by name, and a large number of others in which the principle is enunciated, shows the earnest efforts of the profession to secure a change or modification of its rulings and the necessity for removing this fetter upon the alienation of real property.

The policy of law in America has been clearly pronounced to destroy all restraints upon alienation. North Carolina has stood alone in her conservatism, holding on to an unfortunate decision wholly out of harmony with this current of public policy, until the advisability of a change was so imperative that in *Hodges v. Lipscomb,* 128 N. C., 57, the Court called attention to the necessity of legislation, using this language: "The act of 1784, ch. 204 (now The Code, sec. 1325), converted by one stroke of the legislative pen estates tail into fee-simple, and a similar act placing settlements of the kind before us, whether made by deed or will, in the power of the Courts, or else cutting off the remainders beyond the first takers, after the life tenant, might commend itself to the law-making power by reason of the public policy to disincumber and unfetter the disposal and transfer of realty."

The Legislature adopted the first suggestion, and by the broadest terms in section 1 of the act gave the Courts power over settlements of this kind. A very strict construction of section 2 will absolutely defeat the legislative purpose.

The case as bar is an apt illustration of how this may be

done. Each of the life tenants has a large number of children, one has six and the other seven, several being married, and there now being *in esse* three grandchildren. The possibility that the life tenants will die without children or the issue of children living at their death, or the death of either, is most remote. And yet there have been made parties to this action all of those persons who would be heirs at law of the life tenants and of the testator, if the contingency should happen now, there being forty-five persons embraced in this class, not counting the husbands of the married women, who have also been made parties.

If we now assume that all of these persons will be dead and without issue when the contingency happens, then it will be necessary for us to go back still further to ascertain who are the heirs at law of the great-grandfather, and which of them are now *in esse,* and serve summons personally on each of them. After this has been done, will the statute require us to assume that it is possible that all of this class may be dead when the contingency happens, and without issue, and so require us to ascertain who among the heirs at law of the great-great-grandfather are now *in esse,* after having first made parties the heirs at law of the great-grandmother? Such remote contingencies will not be noticed by the Court. "A bare expectancy is not a vested right." *Bass v. Nav. Co.,* 111 N. C., 439; 19 L. R. A., 247.

It is the desire of the Courts, wherever possible, to carry out the ascertained purpose of the testator. In the case before us the primary beneficiaries of the testator's bounty are his adopted daughters, their children being next in his mind. The children of each become the next objects of his benefaction in the share of their aunt, and he might well have stopped here; but out of abundant caution he inserted a provision providing for the ultimate limitation over, still having his adopted daughters in mind, giving their heirs at law one-half of his

property as ultimate remaindermen. The admitted facts in this case show that the land devised is in the heart of one of our most progressive and growing cities. It must bear city taxes. Already assessments have been levied against it for special benefits by reason of street improvements, curbing and paving. A large portion of it is unimproved, and hence non-income bearing, and as the city grows, instead of becoming more valuable to the objects of the testator's bounty by reason of this ulterior limitation, the charges are increasing and the income decreasing, and no money with which to keep the houses in repair. A strict construction of the statute would continue this state of affairs indefinitely and defeat the testator's intention; and thus public policy and the testator's wishes unite to support the action of the Court below.

Courts of equity were brought into existence to alleviate those hardships which the law by its rigor imposed. These courts have ever exercised the right to take a *rem* into its possession for the purpose of its preservation, when by law this could not be done. When, because of infancy or other lack of capacity, parties could not represent themselves in court, these courts always appoint an officer of the court to look after and protect their interest.

The fundamental error in *Watson v. Watson, supra,* is in this sentence: "The difficulty consists in there being no person in existence for whom the Court can be called upon to act." The Court was not called upon to act in the interest of individuals, but in the interest of the property. It was the protection and preservation of the *rem* that called into existence the equitable power of the Court. It is an easy matter to appoint a representative for those unborn, and who might never be born, that the property might be preserved to await the uncertainties of the future. In this way their interests are fully protected. Chapter 99, Laws 1903, particularly confers the power of control and authorizes the Court to

appoint a representative, not only for persons not in being, but for those whose names and residences are not known. It is the clear purpose of the statute to give the Court full power, and when all of the representatives of the first class of takers under the ulterior limitation are made parties to the proceeding, it would seem hardly necessary to do more. But here more has been done. A representative to represent all possible contingencies has been appointed, and such remote interests have been represented by counsel. That act was passed, as already stated, in consequence of a suggestion of this Court, which was made in view of the difficulties entailed by Watson's case. The provisions of the statute have been carefully complied with. It would not be necessary to recite the facts and law so fully but for the importance of the principle involved and to prevent all doubts about titles resting upon the new statute.

The ground of this decision and its reasoning have been so clearly and ably stated in the excellent brief prepared by Messrs. G. W. Connor and T. B. Womack, counsel for the plaintiffs, that we have done little more than to copy and adopt it as our opinion.

No error.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

ELLIOTT v. JEFFERSON.

(Filed October 20, 1903.)

BOUNDARIES—*Deeds—Variance.*

Where a survey of land is made in contemplation of a division by deed, the line marked on the survey does not control the calls in deeds subsequently made, in case of a variance, in the absence of fraud or mistake.

ACTION by J. D. Elliott against M. F. Jefferson, heard by Judge *Fred. Moore* and a jury, at October Term, 1903, of the Superior Court of BEAUFORT County. From a judgment for the defendant the plaintiff appealed.

W. B. Rodman, for the plaintiff.
Small & McLean and *C. F. Warren,* for the defendant.

DOUGLAS, J. This is an action for the recovery of certain logs and in its determination involves the title to the land from which the logs were cut. There are many exceptions both to the giving and refusal of instructions, but all that are necessary for us to consider are substantially involved in the question whether the line run and marked by Burbank before the execution of the deeds in question should control the boundaries of the land regardless of the calls in the deed. As the jury found the issues as to title in favor of the defendants, all question as to the measure of damages is practically eliminated from the consideration of this case. Both parties claim under J. S. and W. H. Lodge by deeds of equal date, so the only question of boundary is as to the dividing line between the two tracts.

The principal exception relied on by the plaintiff is to the refusal of the Court to give the following instruction:

"If the jury, from the evidence, find that the two Lodges, who then owned the land, in 1875 employed the witness Burbank to run out these lands, which are afterwards conveyed unto the Morgans and Mrs. Corbin, and that in making this survey of these lands the witness Burbank ran from the gum to the pine and from the pine to the cypress stump under water, and that this line from the pine to the stump was blazed or marked, and that afterwards the deed to the Morgans was made, calling from the gum north 73 east, and from the pine 73½ east, and that the line called for in these deeds was the line which Burbank ran from the gum to the pine and from the pine to the stump under water, then these lines actually run and marked would be the true lines, whether the course given in the deed was the same course the compass now gives or not."

If this prayer referred to the purpose and intent of the grantors at the time the deeds were executed, we think it is sufficiently included in the instructions that were given. If it meant anything else it was properly refused.

The following instructions, among others, were given by the Court:

"The Court charges you that the burden is upon the plaintiff to satisfy you by a preponderance of the evidence that W. H. and John S. Lodge, for the purpose of making the division above mentioned, had the line claimed by plaintiff actually run and marked, and established such line as the dividing line between these two tracts of land; and further, that when the deeds to Mary Morgan and Martha Corbin were made, on March 15, 1876, after the survey of Burbank, it was the intention of said W. H. and John S. Lodge, in describing the lands conveyed in said deed, to convey the same as run and marked by said Burbank; and the plaintiff must satisfy you by a preponderance of the evidence that this line was actually run and marked as the division line between

the Morgan and Corbin land, and that when the deeds were made it was the purpose and intention of said John S. and W. H. Lodge to convey the land in accordance with this line, if you find that the same was run and marked as before explained." * * * * * * *

"Now, if you should find from the evidence that it was the purpose of the parties to this deed at the time the same was made not to run from the pine to the stump, but that it was their purpose and intention to run from the pine the course and distance called for in the deed to the creek, then the line as described in this deed, allowing the proper variation, would be the true line of the defendant Jefferson." * * *

"If you should find from the evidence that it was the purpose and intention of the parties to the deed to begin at the gum designated by Gay and run the course and distance given in the deed to Mary Morgan, then the line as described in said deed, allowing the proper variation, would be the true line of the Mary Morgan tract."

"If it was the purpose and intention of John S. and W. H. Lodge to make the line from the pine to the stump the division line between the Mary Morgan and Martha J. Corbin land, and the survey was made for that purpose, and the line actually run and marked, still they could abandon such purpose and intention and make the lines such as they inserted in the deeds, and if they did not so abandon their purpose the lines as inserted in their deeds would control."

We see no error in these instructions or in any material part of the charge.

The plaintiff says in his brief:

"We submit that these instructions as given by the Court were erroneous, in that they made the whole question of whether the marked line controlled in the deed turn on whether the course as given was given by mistake or not.

"We contend that there are two grounds upon which the marked line controls:

"1st. When the call is north or south and the line actually runs south or north, we submit that there is a question of mistake; that the draughtsman simply makes the mistake of reversing his call.

"2d. That there is another ground, and that is that where a surveyor goes out and actually runs a line and takes the course as given by his compass at the time, and records that course, and the line is marked by it, that the marked line controls. The course as given by his compass may be recorded by the draughtsman correctly, but the compass may have had some temporary aberration of the needle, causing it to read incorrectly.

"Now, this view of the law was entirely excluded by the charge as given by the Court, but it was made to depend upon the question of *intention and mistake,* and, we submit, under the authorities above cited, was erroneous."

His Honor was correct in charging that the jury should be governed in their verdict by what they might find to have been the purpose and intention of the grantors at the time of the execution of the deeds. If at that time they intended to adopt the line run and marked by Burbank, and thought that the calls in the deed followed that line, there was evidently a mistake in drawing the deed, as it failed to correctly set forth the intention of the grantors. If, however, they intended the line to follow the calls in the deed, regardless of any marked line, such calls must control the location of the line. Where the description in a deed is not inherently inconsistent it is the *prima facie* expression of the will of the grantor. It is different where, for instance, the courses and distances are incapable of practical location or are inconsistent with marked lines or other natural objects called for in the deed itself. This matter would have been much sim-

plified if the deeds in question had called for the Burbank line, which might easily have been done had the grantors so desired.

There is an exception to the following charge: "That if the two deeds to Mary Morgan and Martha Corbin were drawn without mistake on the part of the draughtsman, then the lines called for in these deeds would control and not the marked lines, if any exist." This paragraph, taken by itself, might be capable of misconstruction from the use of the word "draughtsman," but we think it is so qualified by the remainder of the charge as to clearly inform the jury that they must be governed by the intent of the grantors, whose language the deed is supposed to be, in the absence of evidence to the contrary.

We think the error of the plaintiff lies in a misapprehension of the application of the rule that in case of a discrepancy a marked line controls the calls in the deed as to courses and distances. This rule never applies unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the intent of the grantor. The mere running and marking of a line can never convey the title to land, nor can it take the place of a deed. At best, it can only serve to locate the land conveyed in the deed, and can operate only in aid of the deed. Admitting that a line is run in contemplation of a deed, it does not bind the grantor, as a different contract may be made or the line subsequently changed. As no title can vest except by the execution of a deed, the vital question is the intent of the grantor at the time of such execution.

Perhaps the farthest this Court has gone in allowing marked lines to control a conveyance of land is in *Barker v. Railway,* 125 N. C., 596; 74 Am. St. Rep., 658. It was there held that where a grantor had executed a deed, defective in fact but admittedly intending to convey the land in ques-

tion, and, in furtherance of such intention, had had the land surveyed and had placed the defendant in possession thereof under known and visible boundaries, he was *estopped* from maintaining an action of ejectment against the defendant, who had ever since remained in open, continuous and adverse possession. That case turned upon the doctrine of estoppel, and not upon the theory that the marked lines and corners had given validity to the deed. If the defendant had not been in possession, and especially if the land had been in possession of an innocent purchaser, a different question would have been presented.

Wherever a marked line or other natural object is permitted to vary the description called for in the deed, it is always in presumed furtherance of the intent of the grantor in the execution of the deed. In other words, it is to carry out the true intent of the deed, and never in derogation thereof. This principle is clearly recognized in the authorities cited by the plaintiff himself, as will appear from the following extracts:

In *Cherry v. Slade,* 7 N. C., 82, which really went off on the point that the jury, instead of finding the facts, had only found the evidence, *Taylor, C. J.,* says, on page 90: "This rule is founded upon the same reasons with the preceding ones, the design of all being to ascertain the location originally made; and, calling for a well-known line of another tract, denotes the intention of the party with equal strength to calling for a natural boundary, so long as that line can be proved."

In *Reed v. Schenck,* 13 N. C., 415, the Court says, on page 417: "For many years we have in all cases, I believe, except one, adhered to the description contained in the deed, and it is much to be lamented that we do not altogether. The case to which I allude is where the deed describes the land by course and distance only, and old marks are found corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and dis-

tances that they may well be supposed to have been made for its boundaries, the marks shall be taken as the *termini* of the land. This is going as far as prudence permits; for what passes the land not included by the description in the deed but included by the marked *termini*? Not the deed; for the description contained in the deed does not comprehend it. It passes, therefore, either by parol or by a mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the *termini* of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer, or rather supposed that the courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed or by the marked *termini*."

In *Safret v. Hartman*, 50 N. C., 185, the Court says, on page 189: "His Honor charged 'that notwithstanding the black oak was not called for in the deed, yet if it was marked as a corner to the land conveyed at the time of the conveyance, the line should be extended to it, regardless of course and distance.' In this there is error. His Honor misconceived and misapplied the rule laid down in *Cherry v. Slade*, 7 N. C., 82, 'where it can be proved that there was a line actually run by the surveyor, which was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed.' This rule presupposes that the patent or deed is made in pursuance of the survey, and that the line was marked and the corner that was made in making the survey was adopted and acted upon in making the patent or deed, and therefore permits such line and corner to control the patent or deed, although they are not called for and do not make a part of it. Parol evidence being let in for the pur-

pose of controlling the patent or deed by establishing a line and corner not called for, as a matter of course it is also let in for the purpose of showing that such line and corner were not adopted and acted on in making the patent or deed, because the rule presupposes this to be the fact."

In *Baxter v. Wilson,* 95 N. C., 138, the Court says, on page 143: "For instance, when there has been a practical location of the land, as when it can be proved that there was a line actually run and marked and a corner made, such a boundary will be upheld, notwithstanding a mistaken description in the deed. *Cherry v. Slade,* 7 N. C., 82. The construction has been adopted by our Court to carry out the intention of the parties when it is clearly made to appear, and, to effect that object, course and distance will be disregarded if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so when some monument is erected contemporaneously with the execution of the deed."

The doctrine thus laid down is in full accord with the principles enunciated and the cases cited in *Bowen v. Gaylord,* 122 N. C., 816, and is sustained by the general current of authority here and elsewhere. In the construction of all deeds and grants there is one essential object to be kept in view, and that is to ascertain the true intent of the grantor and to give full effect to that intention when not contrary to law. All rules of construction adopted by the courts are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to that intention. Hence all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. This doctrine is of such universal acceptance as to require but few citations, more to illustrate its extent than to prove its existence.

It is well expressed by *Chief Justice Shaw,* in *Salisbury v. Andrews,* 19 Pick. (Mass.), 250, 252, as follows: "In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable, all, however, designed to aid in ascertaining what was the intent of the parties, such intent, when ascertained, being the governing principle of construction."

In *Smith v. Parkhurst,* 3 Atk. Rep., 135, *Lord Chief Justice Willes* says: "Another maxim is that such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor. The words are not the principal thing in a deed, but the intent and design of the grantor. We have no power, indeed, to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. Those maxims, my Lords, are founded upon the greatest authority—*Coke, Plowden* and *Lord Chief Justice Hale;* and the law commands the *astutia*—the cunning—of judges in construing words in such a manner as shall best answer the intent. The art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill becoming, a judge."

Devlin on Deeds, sec. 835, says: "But it is doubtful how far arbitrary rules can be of service where the only object is to determine the intention of the parties. In fact, the truth was well expressed by *Mr. Justice Sanderson (Walsh v. Hill,* 38 Cal., 481, 487), who said that 'in the construction of written instruments we have never derived much aid from the technical rules of the books. The only rule of much value is to place ourselves as near as possible in the seats which were occupied by the parties at the time the written instrument was executed, then taking it by its four corners, read it.' This is the main object of all constructions. When the inten-

tion of the parties can be ascertained nothing remains but to effectuate that intention."

The judgment of the Court below is

Affirmed.

COMMISSIONERS OF CHATHAM COUNTY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed October 27, 1903.)

1. TAXATION — *Local or Special Assessments — Stock Law — Easements—Railroads.*

The road-bed and right of way of a railroad are liable to an assessment for local improvements.

2. TAXATION—*Local or Special Assessments—Corporation Commission—County Commissioners.*

An assessment levied by county commissioners for the purpose of local taxation, based upon the valuation of the corporation commission, cannot be sustained.

ACTION by the Board of County Commissioners of Chatham County against the Seaboard Air Line Railway Company, heard by Judge *O. H. Allen,* at May Term, 1903, of the Superior Court of CHATHAM County. From a judgment for the defendant the plaintiff appealed.

R. H. Hayes, for the plaintiff.

J. D. Shaw and *H. A. London,* for the defendant.

CONNOR, J. This was a controversy submitted to the Court without action upon an agreed state of facts. By an act of the General Assembly a stock law was established in Chatham County through which the defendant's road passes. The

Raleigh and Augusta Air Line Railroad Company owns a right of way with track and depots thereon from the Wake County line to the line of Moore County, through New Hope, Cape Fear and Oakland townships, which was assessed by the North Carolina Corporation Commission for taxation in 1900, 1901 and 1902, at $74,390. The Commissioners in November, 1902, levied a "stock law" tax for 1900 on the said railroad company's right of way, etc., of 20 cents on each $100 of assessed value for taxation in said townships; for 1901, 15 cents, and for 1902, 10 cents, and adopted the following order: "That a tax levy of ten cents is made on the one hundred dollars of value of real estate embraced within the present stock law territory in said county, known as the Pittsboro and Pioneer stock law territory." On April 6, 1903, the following order was made by the Commissioners: "Ordered, by the Board of Chatham County Commissioners, that the order of the board at its meeting in November, 1902, relative to railroad taxes be changed so as to require the railroads mentioned to pay the stock law tax for the years 1900, 1901 and 1902." Pursuant to said orders, the Register of Deeds has computed taxes against the said railroad as set forth in the case agreed and the sheriff of said county threatens to collect the same. The Corporation Commission, in accordance with the statute, valued the right of way, including tracks and buildings thereon of the defendant as an entirety, and apportioned to Chatham County such part of the whole amount as the length of the road in Chatham County bore to the entire length of the road, and it was upon this valuation that the "stock law" assessment was computed. The defendants, the several railroads parties to this controversy, insist that their right of way, road-bed, depots, etc., are not liable for the assessment levied upon them, because in the act prescribing the method of taxation of railroads it is expressly provided that their right of way, etc., shall be

assessed as personal property; that they do not own the land, but simply a right of way or easement, and rely upon the language used by this Court in *Shields v. Railroad,* 129 N. C., 6.

It is undoubtedly true that as between the railroad and the owner of the land condemed, the former acquires by condemnation proceedings only an easement to be used for the purposes set out in its charter. It is equally clear that the Corporation Commission, the agency appointed for the assessment of railroad property, is directed to assess and value the right of way, etc., as personal property.

The liability of railroads for assessment for local improvements has been the subject of much discussion and conflict of decision. Elliott on Railroads, section 786, says: "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessment. The question has been discussed in a great number of instances and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that where the right of way receives a benefit from the improvements for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment." In *Northern, etc., R. Co. v. Connelly,* 10 Ohio St., 159, it is said: "If railroad tracks are taxable for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments." The question seems to have been decided by the Supreme Court of Illinois in a number of cases, the latest being *Cicero Ry. Co. v. City of Chicago,* 176 Ill., 501, in which it is said: "It is true that the street railway company did not acquire the fee in the street, but by the ordinance the street railway company obtained the right to occupy and use the street for a period of twenty years.

Under the grant it took possession of the street, constructed its road-bed, laid down its ties and fastened thereon its rails, and thus acquired the possession and use of the street for the purpose of operating its line of road. The franchise and right of user constituted property of a fixed and immovable character, like real estate, and, so far as that property is benefited, no reason is perceived why it should not bear its just proportion of the cost of an improvement in the same manner and to the same extent as any real estate which may be contiguous to the improvement." The Court further says: "Reliance is, however, placed on section 15 of chapter 120 of the revenue law, which provides as follows: 'The track, road or bridge shall be held to be personal property and listed and assessed as such.' The fact that the track of a street railway company may be required to be assessed as personal property for general taxation has no bearing on the question. No question in regard to the assessment and collection of general taxes under the revenue law of the State is involved in this case. The Legislature, no doubt, had the right to provide, in the assessment of property for county, State and city purposes, that the track of a street railroad company might be assessed as personal property, without changing the nature or character of the property, when a proceeding might be instituted to make an assessment on contiguous property to pay for a local improvement. No reason is perceived why for one purpose it might not be treated as personal, and for the other as real property."

It having been settled by this Court that it is within the power of the Legislature to establish stock law districts and provide for an assessment upon the land therein to pay for building and maintaining the common fence, upon the theory that the land within said territory receives a special benefit from the establishment of the stock law, we can see no reason why all of the land and all such interests as are capable of

receiving the benefit and being assessed therefor, do not come within the provisions of the law. *Cain v. Commissioners,* 86 N. C., 8. The defendants, however, contend that admitting this to be true, the Commsisioners cannot adopt a valuation placed upon their road-bed and right of way by the Corporation Commission, because in making such valuation their entire line of road and elements of value other than the land and improvements thereon are taken into consideration; that for the purpose of levying this assessment the land or their interest therein should be assessed without regard to its connection with other portions of the road-bed and without regard to its value by reason of the use to which it is put. There is great force in this contention. Certainly it is the land and permanent structure thereon which is subject to the assessment, and it should be assessed with reference to the special benefit which it enjoys by reason of the stock law. It is apparent that several interesting and difficult questions may be presented when it is sought to apportion the burden which the right of way and road-bed should bear measured by the special benefit it enjoys. We do not feel called upon, nor would it be proper upon this record, to discuss or decide these questions. The Legislature does not seem to have provided any machinery for assessing the right of way and road-bed of railroads running through stock law territory. The valuation placed upon it by the Corporation Commission certainly cannot be adopted as the correct one for apparent reasons. His Honor continued the injunction, and in doing so committed no error.

We simply decide in this case two questions:

1. That the road-bed and right of way of the defendant is liable to an assessment for local improvements as other real estate.

2. That the assessment levied by the Commissioners, based

upon the valuation of the Corporation Commission, cannot be sustained.

The judgment of his Honor is, therefore,

Affirmed.

PENNY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed October 27, 1903.)

1. CARRIERS—*Passengers—Negligence—Personal Injuries.*

A railroad company must notify passengers of danger if the same is or should be known to its employees.

2. PLEADINGS—*Variance—Allegata et Probata.*

To allege one person to be the conductor, whose duty it was to warn a passenger of danger, and the proof shows that a different person was the conductor, is an immaterial variance.

ACTION by B. F. Penny against the Atlantic Coast Line Railroad Company, heard by Judge *R. B. Peebles*, at February Term, 1903, of the Superior Court of NEW HANOVER County. From a judgment of non-suit the plaintiff appealed.

E. K. Bryan and *Bellamy & Bellamy*, for the plaintiff.

Junius Davis, John D. Bellamy and *Rountree & Carr*, for the defendant.

MONTGOMERY, J. The evidence in this case was that in September, 1898, the conductor, Carmon, of the defendant's train made an assault upon a passenger, Sam Calloway, a few miles from Wilmington; that a man by the name of LaMotte, who was also in the service of the defendant company, but in another State, took part in the assault; that Van Amringe, the baggage master on that train, witnessed the

assault and armed himself with a pistol; that Calloway was "quieted" and searched for weapons, but none were found; that when the train arrived at a station called Leland, Calloway having reached his destination, in leaving the second class car, was followed by LaMotte to the platform, when Calloway said to him: "What are you going to do?" that LaMotte called for a pistol, and one was given to him by Van Amringe; that LaMotte tried to shoot Calloway, who was retreating with his face to LaMotte alongside and a little off from the first class coach; that Van Amringe was standing at the brake on the front platform of the first class coach, and Carmon on the platform of the first class coach; that Van Amringe and Carmon saw, or could have seen, what was going on; that just at that time the plaintiff, intending to get off, came out of the second class car, walked by LaMotte and across to the platform of the first class car and then down the steps between Van Amringe and Carmon, and upon reaching the bottom step was shot and badly hurt by Calloway, who had fired at LaMotte. Van Amringe testified that as Calloway retreated LaMotte leveled the pistol at Calloway and snapped it two or three times before Calloway got his pistol out and opened fire; that he saw Calloway with the pistol, and that Carmon could have seen it if he had looked. Van Amringe further testified that neither he nor Carmon notified or warned the plaintiff of his danger, and that the reason he did not was that he did not think—"a person can't think of everything on an occasion like that." The plaintiff testified that he was not noticing anything as he was getting off, and did not know that he was in any danger.

Upon an intimation of his Honor that the plaintiff could not recover on the evidence, he submitted to a non-suit and appealed. The evidence, then, for the present discussion, is to be taken as true, and in the strongest light for the plaintiff. That being so, it is evident that it was the purpose of La-

Motte to kill the man Calloway, whom he thought to be helpless and unarmed; that Van Amringe knew the purpose of LaMotte and furnished him with the instrument of death; and Van Amringe said that Carmon, from where he was standing, could see the negro, Calloway—"he could have seen him, for we all saw what was going on, and I suppose he did." I did not say he did see him."

There is but one question in the case: Did the defendant owe the duty to the plaintiff to warn him as to the danger of the situation? If Calloway had intended to make the assault directly upon the plaintiff, the duty of the defendant would have been to have protected him to the extent of its ability, as is so clearly laid down in *Britton v. Railroad,* 88 N. C., 536; 43 Am. Rep., 749. Up to the time that case was decided it seems that there was no express decision of this Court on the duty of a common carrier on the subject of the protection of passengers against assaults of their fellow passengers or strangers, but the Court there said: "According to the uniform tendency of these adjudications (decisions of other courts), which we admit as authorities, the carrier owed to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented; and while not required to furnish the police force sufficient to overcome all force when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties."

This was not a direct assault by Calloway upon the plaintiff, who was a passenger on the defendant's train when he was shot by Calloway, but we think that in law the carrier's

duty would be as clear to warn and give notice to an alighting passenger who was in danger of being injured by violence at the hands of outside parties as it would be to protect them against assaults at the hands of others. It seems to us that the same rule would apply in both cases. The defendant was charged with the plaintiff's safe exit under the rule laid down. The imminence and suddenness of the danger, as well as the strength and numbers of those offering violence to passengers, would be matters to be considered by the jury in connection with the carrier's duty.

In this case, however, the evidence discloses culpability on the part of the defendant, in that Van Amringe, the baggage master, without any excuse of matter of extenuation, brought about the act of violence by which the plaintiff was injured, and, according to his evidence, the conductor, Carmon, knew or might have known what was going on.

In the complaint it was alleged that LaMotte was the conductor of the train, and through his negligence in failing to notify the plaintiff of his danger, the plaintiff was injured, while the evidence shows that Carmon was the conductor. That is immaterial, for the evidence discloses a case of negligence on the part of the defendant, and it makes no difference that Carmon was the conductor instead of LaMotte, as was alleged in the complaint. And, besides, the evidence was not objected to by the defendant. *Robeson v. Hodges,* 105 N. C., 49.

Error.

HODGES v. WESTERN UNION TELEGRAPH COMPANY.

(Filed October 27, 1903.)

1. EMINENT DOMAIN — *Telegraphs — Easements — Damages — Railroads.*

A telegraph line along a railroad and on the right of way thereof is an additional burden upon the land, for which the land owner is entitled to just compensation.

2. EVIDENCE—*Eminent Domain—Telegraphs—Railroads.*

In an action by a land owner against a telegraph company for damages because of the erection of poles on the right of way granted to the railroad, evidence that the telegraph line was necessary to the operation of the road is immaterial.

3. LIMITATIONS OF ACTIONS—*Eminent Domain—Telegraphs—The Code, sec. 155, subsec. 3—Acts 1895, ch. 165—Trespass.*

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation.

4. EMINENT DOMAIN—*Trespass—Damages—Telegraphs.*

In an action against a telegraph company for the erection of poles on the land of plaintiff, it is error to instruct that in addition to permanent damages the land owner was entitled to recover for damages to crops.

ACTION by G. R. Hodges and wife against the Western Union Telegraph Company, heard by Judge *H. R. Bryan* and a jury, at May Term, 1903, of the Superior Court of HARNETT County.

On January 15, 1883, the plaintiff executed to the Wilmington and Weldon Railway Company a deed reciting that said company contemplated building a branch line of its railroad, etc., and that "for and in consideration of the benefits to be derived from the building of said branch road, and

in further consideration of one dollar," the plaintiff grants to the said company, "its successors and assigns all the following described rights of entry, rights of way and other rights, privileges and easements, that is to say, a free and perpetual right of entry, right of way and easement at any and all times, for the purpose of surveying, building, constructing, operating, altering, improving and repairing the said branch line of railroad, its depots, station houses, warehouses, bridges and all necessary erections, and for all other purposes necessary and convenient for the use, operation and business of the said branch road in, through and over a strip of land one hundred and thirty feet wide, that is to say, measuring sixty-five feet on each side of, and at right angles to, the center of track or road-bed of the said branch line, etc." Pursuant to this grant the company surveyed, located and built the branch line of road over the plaintiff's land, and operated the same until its assignment of its property and rights to the Atlantic Coast Line, and said assignee has at all times since maintained and operated said railroad. During the year 1888 the said company constructed a telegraph line with one wire and small poles over the line near the road-bed ditch, and a year or two afterwards the defendant placed another wire on the said poles. On June 1, 1880, the Wilmington and Weldon Railway Company entered into a contract with the defendant company whereby it was agreed that "the railroad company, so far as it legally may, and to the extent of its corporate power, hereby grants and agrees to insure to the telegraph company the right to keep, maintain and operate its existing line of telegraph, and to construct, maintain and operate such additional lines and wires as it may elect on and along the line and bridges of the railroad company's right of way, and upon any branches and extensions thereof, etc. The telegraph company agrees to pay "for the occupancy of the said right of way," fourteen dollars

per mile. There are certain other stipulations not material to this controversy. "The telegraph company agrees to maintain its line along said railroad in good order and repair and to set apart one wire for the business of the railroad company exclusively and for the local commercial offices maintained by it." The seventh clause of the agreement is in the following words: "Neither the terms of this agreement, nor any stipulation herein contained, shall have the effect of creating a covenant of quiet enjoyment, either express or implied, on the part of the railroad company and in favor of the telegraph company, or against the owner of the fee-simple of the land over which the railroad company has the right of way." The provisions of the contract are declared to extend "to all roads, branches and extensions now or hereafter owned or controlled by the railroad company," and to continue for twenty years.

On March 23, 1887, the Wilmington and Weldon Railway Company entered into another contract with the defendant in regard to the erection and maintaining of telegraph poles and wires along said branch road. This contract continued for one year. On March 23, 1888, the said railway company entered into "a supplemental agreement" with the defendant company. By this agreement "the railroad company, for and in consideration of three thousand seven hundred and eighteen dollars, lawful money of the United States, to it in hand paid by the telegraph company, the receipt whereof is hereby acknowledged, has bargained, sold, assigned, transferred and set over unto said telegraph company, its successors and assigns, all of said line of poles and wires between Wilson and Fayetteville, N. C., aforesaid, being altogether about seventy-one and a half miles of poles and seventy-one and a half miles of wire, more or less, together with all loops, insulators, brackets, fixtures and appurtenances thereunto belonging, and including all instruments, batteries, tools, machinery, appliances and office appurtenances and all telegraph material

now used and on hand for use in connection with said line, together with full right and license to maintain, operate, repair and renew said line upon and along the right of way of the railroad company. To have and to hold the same unto the telegraph company, its successors and assigns, to and for their use and behoof forever." The railroad company released the telegraph company from payment of the rental provided for in the contract of June 1, 1880. The provisions of the agreement between the parties dated June 1, 1880, except as herein amended, are declared to apply and extend to said railroad and telegraph line between Wilson and Fayetteville, and to all other rights and privileges owned and controlled by the said railroad company. Among the provisions set out in the contract of June, 1880, the telegraph company agrees that it will maintain its line along said railroad in good order and repair and to set apart one wire, and upon six months' notice to set apart a second wire, for the use of the railroad company. Certain other provisions in regard to the terms upon which the business was to be conducted are fully set out.

The plaintiffs allege that they are the owners of the tract of land in Harnett County, and that it is the same land over which they have granted to the railroad company a right of way as herein set out. They further allege that the defendant has caused to be placed in and upon said land, and extending across the same for the length of nearly a mile or more, a row of posts, and has sunk anchor wires from some of the posts into the ground, and has strung wires over and across said premises, and unlawfully and wrongfully continues to keep up and maintain the said posts and wires, going upon and over said land to attend to the same, and have already taken and appropriated the plaintiff's said land to its own use; the said posts and wires are an obstruction to the plaintiffs in the cultivation of their farm and the use of the same, interfering with the plaintiffs in the use of their farm imple-

ments and constituting a continual nuisance to these plaintiffs, and that the plaintiffs have not at any time given the defendant permission or conveyance to the easement or right or title to the said land, or the right to go over the same, nor any person for them.

The defendant company alleges that on March 23, 1888, the said Wilmington and Weldon Railway Company conveyed to the said telegraph company all of said lines and poles between Wilson and Fayetteville; the said telegraph company using and operating said lines of poles and wires partly for the use of the railroad company, in the operation of its trains and in the necessary maintenance and conduct of its line of railroad; and the defendant alleges that the same is not only expedient and necessary, but the right to construct said line was conveyed to said railroad company and by it to the telegraph company. The defendant company admits that it continues to keep up and maintain said poles and wires, but denies that it does so wrongfully and unlawfully.

The plaintiff testified that in November, 1899, the defendant built an entirely new line, with new poles, wires and fixtures, cross-arms, etc. Those poles were about eighteen feet high, cross-arms about ten feet long, with eight or ten new wires, and this line was located about twenty feet from the original line in the plaintiff's farm. The line includes a space about fifteen feet wide through the plaintiff's land. The original line constructed on the ditches or near them did not interfere with the cultivation of the land. The defendant is doing an interstate business and runs these lines from New York to Dunn, and to cities south as far as Jacksonville. The defendant has an office in Dunn not used for railroad purposes, but which is used entirely for commercial purposes. There is one wire which is used by the railroad company in its business in a separate office from the defendant's commercial office. The other wires on this line are through wires,

and not connected with either office at Dunn. The plaintiff rested and the defendant introduced the contracts hereinbefore set out.

The defendant introduced J. A. Spiers, who testified that he was agent of the Atlantic Coast Line Railway Company; that there was but one line of poles and they are used by the railroad company, and it is the only line. The defendant asked the witness this question: "Is the use of a telegraph line necessary for the safe and proper operation of a railroad?" Plaintiffs object, objection sustained and the defendant excepted. The issues submitted by the Court were:

1. What permanent damages have the plaintiffs sustained by reason of the defendant's appropriation of their land as described in the complaint?

2. Is the plaintiffs' action barred by the statute of limitations?

The defendant asked his Honor to charge the jury that if they believed the evidence, the plaintiffs were not entitled to recover. This was refused and defendant excepted.

Defendant also asked his Honor to charge the jury that from their own knowledge and experience they had a right to find that a telegraph line was necessary for the safe, proper and convenient operation of a railroad, and if they so found, and also found that the plaintiffs made the deed to the Wilmington and Weldon Railroad Company of June 15, 1883, and the railroad company used the said line under the contract made with the defendant company, then the right to construct and use said right of way for such purposes was granted by said deed. And the fact that the telegraph company also used it imposed no additional burden upon the plaintiffs' land, and they must answer the first issue "Nothing." His Honor declined to so charge and the defendant excepted. The defendant further asked the Court to charge the jury that the plaintiffs' cause of action was barred by

the statute of limitations. This was also refused, and the defendant excepted. His Honor charged the jury that under the contracts between the railroad and the defendant in this case, and inasmuch as the plaintiffs had at all times been in the actual possession of the land over which the defendant's line is now located, the defendant's line constituted an additional burden on the plaintiffs' land, for which the plaintiffs were entitled to just compesation. The defendant excepted.

His Honor further charged the jury, at request of the plaintiffs, that the plaintiffs were entitled to the possession of the land as against the railroad company (that is, the right of way), except that the railroad company had the right to the actual use of so much only thereof as is necessary for the operation of its road and to protect itself against contingent damages.

His Honor charged the jury that they should assess the permanent damages caused by the erection of the line, and for the land appropriated by the defendant, also such damages as the plaintiffs had sustained, if any, within the past three years, to the crops on the land over which the defendant's line was located. His Honor further charged that the burden was on the plaintiffs to satisfy the jury that the plaintiffs were damaged at all, and, if damaged, in what amount, and that the jury were the judges of the facts, and not the Court; that they were also the judges as to the amount of damage the plaintiff sustained. There was no exception to this latter part of the charge. There was a motion for a new trial for errors and refusing to admit the evidence as set out, for failure to give charges as asked for by the defendant, and for giving the charges excepted to.

Upon refusal to grant a new trial the defendant appealed.

Stewart & Godwin, for the plaintiffs.
Rose & Rose, for the defendant.

CONNOR, J. (after stating the facts). The defendant admits the entry upon and appropriation of the land, the fee of which is in the plaintiffs, and seeks to justify such entry and appropriation under the contract made with the railroad company. The decision of this contention is dependent upon the proper construction of the grant made by the plaintiffs to the railroad company. It is well settled by this and other Courts that "the right of way of railroad companies is by judgment of condemnation made subject to occupation where and only where the company finds it necessary to take the actual possession in furtherance of the ends for which the company was created. The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only to so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. Unless the land is needed for some such use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter to remove something which is dangerous to the safety of its passengers." *Blue v. Railroad,* 117 N. C., 644; *White v. Railroad,* 113 N. C., 610; 37 Am. St. Rep., 639; 22 L. R. A., 627; *Shields v. Railroad,* 129 N. C., 1; *Phillips v. Tel. Co.,* 130 N. C., 514; 89 Am. St. Rep., 868; *Eels v. Telephone and Telegraph Co.* (N. Y.); 25 L. R. A., 640; 5 Am. El. Cases, 92. It is also said that "when the fee remains in the original proprietor, it is immaterial how the public (or in this case, the corporation) acquired an easement over the land, whether by condemnation or by dedication. It is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land, it

was for no other purpose, and if it was condemned, his damages are assessed with no other view." *Railroad v. Hartley,* 67 Ill., 439; 16 Am. Rep., 624.

"The proceeding by which land is acquired by the exercise of the right of eminent domain amounts to a statutory conveyance of the same to the public or the corporation, and there is no distinction between such a conveyance and a voluntary conveyance made for a public use. By proceedings *in invitum* the statute which authorizes the acquisition constitutes the contract between the citizen and the public, and when the interest has once been acquired it cannot be changed or enlarged." *Story v. N. Y. El. Road,* 90 N. Y., 172; 43 Am. Rep., 146.

Unless, therefore, there is found in the deed of the plaintiffs granting the easement to the railroad company language indicating a purpose, or operating to pass a larger or more extended right or easement than that which would have been acquired by judgment in condemnation proceedings, we must resort to the principles and authorities applicable to rights acquired thereby to define and fix the rights of the parties to this appeal.

It will be observed that the only consideration upon which the grant is founded is "benefits to be derived from the building of the said branch road." The language of the deed is clear and comprehensive. A "right of way and easement" is granted. These are apt and appropriate words for that purpose. The easement is for the purpose of "surveying, building, constructing, operating, altering, improving and repairing" the said branch road. We are of the opinion that this language accurately describes the right or easement which the company would have acquired by condemnation proceedings. It is evident that the deed was drawn by a careful, skillful draughtsman, anxious that all parties should know and understand the legal effect of the instrument. The company, by

the terms of this grant acquired the right to erect and uses so far as was reasonably necessary and convenient for the safe operation of the road and the engines and cars used thereon, a telegraph line, including, of course, the right to place poles in the ground and string wires thereon. We concur in the language of the Court of Appeals of Maryland in the case of *American Telegraph and Telephone Co. v. Pearce,* 71 Md., 535; 7 L. R. A., 200: "We entertain no doubt whatever as to the right of a railroad company to construct on and over its right of way a telegraph or telephone line for its use in the operation of its road and dispatch of its business; and it may do this by itself or may employ another company to do it, or may do it conjointly with another company. If this line is in process of construction or is about to be constructed over the right of way of this railroad company, in good faith, for the use and benefit of the latter in the operation of its road, and to facilitate its business, or is reasonably necessary for that purpose, the land owners have no ground of complaint, because such use of their land is within the scope of the original easement for which they have already received compensation. But, on the other hand, if this is not the motive for its construction, and the main object in constructing it is to establish an extensive line of telegraph and telephone communication through this and other States, for general commercial purposes, for the use and benefit of the defendant, and such a line is not reasonably necessary for the purposes of the railroad, then it will be a new easement, and put a new additional burden upon the land, for which the owners are entitled to compensation." Joyce on Electric Law, sec. 233. This Court has clearly held in *Phillips v. Tel. Co.,* 130 N. C., 513, that "telegraph lines along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the land owner is entitled to just compensation."

This opinion is fully sustained by the best considered authorities in this country.

In *Nichol v. N. Y. & N. J. Tel. Co.*, 42 At. Rep., (N. J.), 583; 72 Am. St. Rep., 666, it is said: "The argument to support the proposition that the right to construct and maintain a telephone line for common public use is within this easement is that the structures are required for the exercise of the right of the electric current which thus travels along the highway. But the resemblance between the use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality the electric current does not use the highway for passage. It uses the wire, and would be as well accommodated if the wire were placed in the fields or over the houses. The highway is used only as a standing place for the structures. Such a use seems to us to be so different from the primary right of passage as to be essentially distinct. * * * We therefore think that the right now under consideration is not within the public easement, and can be acquired against the consent of the private owner of the fee only by condemnation under the power of eminent domain."

In *Broome v. N. Y. & N. J. Tel. Co.* (N. J.), 5 Cent. Rep., 814, it is held that in order to justify a telephone company in setting up poles in the highway it must show that it has acquired the right to do so, either by consent or by condemnation from the owner of the soil."

In *W. U. Tel. Co. v. Williams,* 86 Va., 696; 8 L. R. A., 429; 19 Am. St. Rep., 908, the Court says: "That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases. If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his

private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the commonwealth took this without just compensation it would be a violation of the Constitution. The commonwealth cannot constitutionally grant it to another."

From these authorities and the reason of the thing we conclude that the railroad company only acquired the right to erect and use such telegraph poles and lines as are reasonably necessary for the purpose for which the easement was granted. This seems to have been the construction put upon the contract by the company. We find that in the contract of 1880 there is a careful reservation of the rights of the company. The uncontradicted testimony shows that in 1888 the railroad company, abandoning all idea of joint ownership or joint operation of the telegraph line, conveys, assigns and sets over to the defendant company, in consideration of a sum of money named therein and of certain covenants and agreements contained in the contract, all of the poles and wires upon such right of way between Wilson and Fayetteville, N. C. Thereafter, in 1899, the defendant company erects upon the right of way an entirely new line, placing its poles, much larger than those used by the railroad company, about twenty feet from the original line, and placed upon those poles cross-arms about ten feet long with eight or ten new wires. It is evident that from the position of the poles, the size of them and the larger number of wires used, that no such line is reasonably necessary for the enjoyment of the easement granted to the railroad company. We can put but one construction upon the deed of March, 1888. It was a sale of the property in the poles and wires and an attempt to confer

upon the defendant company a right to erect and maintain a line of telegraph poles and wires for general commercial purposes in connection with its line through this and other States. We cannot construe this into a reasonable use of the easement granted by the plaintiffs to the railroad company, but as an additional burden placed upon the plaintiffs' land. It is clear that the railroad company could not grant to the defendant company an easement. This could be done only by the owner of the soil. *Narron v. Railroad,* 122 N. C., 861; 40 L. R. A., 415. The only effect that the contract of March, 1888, could have was to give to the defendants, so far as the railroad's rights are concerned, a license or right to put its poles and string its wires over and along its right of way, not affecting in any manner the rights of the plaintiffs, the owners of the soil. This right, as was said in *Phillips v. Tel. Co., supra,* could have been acquired against the railroad company by condemnation proceedings, section 2210 of The Code, but would not have affected the rights of the plaintiffs. We therefore think that it was immaterial to inquire of the witness whether the use of a telegraph line was necessary for the safe and proper operation of a railroad. As we have seen, the use of a telegraph line was necessary for the purposes indicated, but the question whether or not this telegraph line was necessary is an entirely different one. We find no error in his Honor's ruling in that respect.

The defendant, however, pleads the statute of limitations in bar of the plaintiffs' action, and requested his Honor to instruct the jury that the action was barred. We think that his Honor was correct in declining to so charge. This action is not for trespass committed by the defendant in entering upon and breaking the plaintiffs' close. As was said in *Phillips v. Tel. Co., supra,* "The sole purpose of this action is to recover compensation for the appropriation of the plaintiff's property by the defendant. * * * The plaintiff does

not seek to eject the defendant, nor to interfere in the slightest degree with the fullest enjoyment of the easement it claims. He does not threaten nor intend to annoy the defendant by a multiplicity of suits, but, on the contrary, he asks the Court, in the exercise of its equitable jurisdiction, to award him such permanent damages as will compensate him for the appropriation of the easement. This being done, the defendant ceases to be a trespasser, and will thereafter remain in the lawful enjoyment of the easement thus acquired. There is, therefore, no question as to whether the defendant shall have the easement, but simply whether he shall pay for it." These observations apply to this action. The plaintiffs demand permanent damages, and the issue submitted to the jury was directed to that inquiry. The appropriation which the defendant has made of the plaintiffs' land is in the construction of its poles and the stringing of its wires in November, 1899, and it is for this appropriation and the easement which will be acquired by the payment of the judgment in this action that the suit is brought. Three years have not elapsed between that date and the issuing of the summons in this action. The plaintiff does not seek to recover any damages for acts done by the defendant prior to November, 1899. We therefore think that the action is not barred by the statute of limitations. We think it unnecessary to discuss the other aspects of this question.

We note that his Honor charged the jury that in addition to the permanent damage caused by the erection of the line and for the appropriation by the defendant, the jury should also assess such damages as the plaintiffs had sustained, if any, within the last three years, to the crops on the land over which the defendant's line was located. This portion of the charge is erroneous, but we find no exception thereto taken by the defendant. Nor do we find any testimony upon which the jury could have assessed such damages. The only testi-

mony in regard to damages was that of the plaintiff Hodges, who placed the damage sustained at $5 per pole. We would be compelled to grant a new trial for this error, if excepted to, but it is well settled by numerous decisions of this Court that unless excepted to, a new trial will not be granted.

Let the judgment of the Court below be

Affirmed.

HATCHER v. DABBS.

(Filed October 27, 1903.)

1. ISSUES—*Sufficiency—Trial—Rules of Practice Supreme Court No. 7.*

The issue, "What damages, if any, plaintiff is entitled to recover in an action for the recovery for services rendered a decedent under a special contract," does not present to the jury all the matters in controversy.

2. COUNTER-CLAIM—*Pleadings.*

In an action for the recovery of services rendered a decedent in a special contract, where the answer sets up a different contract and the performance of the same by the decedent, the same cannot be treated as a counter-claim.

ACTION by S. E. Hatcher against J. A. Dabbs, administrator of S. E. Liles, heard by Judge *O. H. Allen* and a jury, at April Term, 1903, of the Superior Court of ANSON County, From a judgment for the plaintiff the defendant appealed.

James A. Lockhart & Son and *F. J. Coxe,* for the plaintiff.
H. H. McLendon, for the defendant.

WALKER, J. This action was brought by the plaintiff for the recovery of the value of certain services alleged to have been rendered by him to the defendant's intestate, under a special contract, set forth in the complaint. The plaintiff

alleges that in consideration of the said services which he agreed, at the time of the contract, to perform for the intestate, who was at said time an old and infirm man and greatly in need of assistance, the latter promised to devise and bequeath to the plaintiff his entire estate. That in compliance with the said contract the plaintiff performed the stipulated services, but that defendant's intestate failed to comply with his part of said agreement or to devise and bequeath his property to the plaintiff as he had promised to do, and that the services so rendered by the plaintiff were reasonably worth $1,200, which sum he seeks to recover in this action. The defendant denied that his intestate entered into the contract as alleged in the complaint, and avers that a very different contract was made between the parties, and that this contract was fully performed by the intestate. It will not be necessary to refer more particularly to the pleadings, as the foregoing statement sets forth all that is required to present the question upon which the decision of this Court will be given.

The Court submitted the following issue to the jury: "What damages, if any, is the plaintiff entitled to recover of the defendant?" To the submission of this issue the defendant excepted. The jury answered the issue in favor of the plaintiff, and judgment having been entered thereon, the defendant appealed to this Court.

The issue was not a proper one to be submitted to the jury by itself. It did not present to the jury for their consideration all the matters in controversy between the parties, and was therefore insufficient as the basis of a verdict and judgment. It has been settled by numerous decisions of this Court that only the issues of fact raised by the pleadings should be submitted to the jury, and not mere questions of fact growing out of the evidence (*Howard v. Early,* 126 N. C., 170), and such issues as are so raised should be submitted with this

qualification, that it is not required that all the issues should be thus submitted to the jury, but such of them only as are necessary to present the material matters in dispute (*Shoe Co. v. Hughes,* 122 N. C., 296; *Ratliff v. Ratliff,* 131 N. C., 425; *Warehouse Co. v. Ozment,* 132 N. C., 848), and as will enable each of the parties to have the full benefit of his contention before the jury (*Patterson v. Mills,* 121 N. C., 250; *Pretzfelder v. Ins. Co.,* 123 N. C., 164; 44 L. R. A., 424), and with this further qualification, that the issues must also be comprehensive enough to determine the rights of the parties and to support the verdict and judgment in the particular case. *Strause v. Wilmington,* 129 N. C., 99. The provision in our present system of procedure for submitting issues was adopted for the purpose of enabling the jury to find the material facts with as little consideration as possible of principles of law, sometimes difficult for them to understand and apply, and so that the Court, upon the facts thus found, may with greater ease and accuracy declare the law and thus determine the legal rights of the parties. *Bowen v. Whitaker,* 92 N. C., 367. This result cannot be obtained in this case under the issue submitted to the jury. There is no separation of the facts from the law, but the jury are required to consider and decide both the facts and the law, under instructions from the Court, it is true, but, nevertheless, in direct contravention of the very spirit and purpose of The Code and the rule of this Court. There is another objection to the issue: It virtually implies that the defendant is liable to the plaintiff, and merely requires the jury to ascertain the extent of the liability, and in this respect it may have confused if it did not mislead them, even though the instructions of the Court embraced the various contentions of the parties and were correct in themselves. In *Denmark v. Railroad,* 107 N. C., 186, the plaintiff brought his action to recover damages for injuries negligently inflicted by the defendant, and

the defendant, having denied the negligence and pleaded contributory negligence, tendered the usual issues, but the Court refused to submit them, and in their stead submitted to the jury the single issue as to damages, which was identical in form with the issue submitted in our case. This Court held that it was error to thus restrict the issue, for the question of damages was incidental merely to the main issue as to the negligence of the defendant, and could only arise in the case should the jury find the preliminary issue as to negligence in favor of the plaintiff. The issue itself amounted to little, if any, more than the general issue. That case and the more recent case of *Burton v. Mfg. Co.,* 132 N. C., 17, which cites it with approval, cannot be distinguished from the one at bar, and are directly in point. The submission of issues is not a mere matter within the discretion of the Court, but it is now a mandatory requirement of the law, and a failure to observe this requirement will entitle the party who has not in some way lost the right to have the error of the Court corrected. *Bowen v. Whitaker, supra;* Rules of Practice, 128 N. C., 656.

There is one other question left in the case. The defendant moved for judgment upon his counter-claim, as the plaintiff had failed to reply thereto. The Court refused the motion, and the defendant excepted. We can see no error in this ruling. The averments of the answer constituted a defense rather than a counter-claim. The plaintiff alleged a special contract of the intestate to make a will in his favor for certain services to be rendered and which were afterwards rendered by him, and he then alleged that the intestate had died without making the will and had thus failed to comply with his contract, and he therefore asked for the reasonable value of his services. The defendant alleged that a different contract was made, and that the intestate fully complied with its terms. According to his own version of the contract, the plaintiff, for his services, was to receive as compensation a

home and farm free of rent, live stock, farming implements and provisions. It is true he alleges that what the plaintiff thus received was greater in value than the services rendered, but we do not see that this implies a promise to pay the excess of value, as the plaintiff only received under the contract, as alleged by the defendant, what he was entitled to have, and the difference in value was not considered by the parties at the time. If the defendant had alleged that the intestate furnished more than was required by the contract, and under such circumstances as to imply a promise of the plaintiff to pay for the excess, a different question would have been presented. As the case now stands, the defendant is only entitled, if he sustains the averments of the answer by proof, to have the matters therein set forth considered by the jury in passing upon the plaintiff's claim and for the purpose of defeating his recovery. There was error in the ruling of the Court upon the issues.

New trial.

LASSITER v. RALEIGH AND GASTON RAILROAD COMPANY.

(Filed October 27, 1903.)

1. NEGLIGENCE—*Contributory Negligence—Railroads.*

A conductor in charge of a freight train in a railroad yard, who, while giving instructions for the movement of his train, steps on a side track without looking for other trains, is guilty of contributory negligence.

2. NEGLIGENCE—*Proximate Cause—Contributory Negligence—Master and Servant—Questions for Jury.*

In an action against a railroad company for the death of a freight conductor, killed by being run over by a shifting engine, the question whether the company's failure to have a watchman on the cars attached to the engine was the proximate cause of the accident is, under the evidence, for the jury.

ACTION by A. Lassiter, administrator of A. E. Lassiter, against the Raleigh and Gaston Railroad Company, heard by Judge *H. R. Bryan* at February Term, 1903, of the Superior Court of WAKE County. From a judgment for the defendant the plaintiff appealed.

Battle & Mordecai and *N. Y. Gulley,* for the plaintiff.
Day & Bell and *T. B. Womack,* for the defendant.

MONTGOMERY, J. The plaintiff's intestate, A. C. Lassiter, a freight conductor in the defendant's service, was standing between the main track and a side track in the defendant's yard in the town of Henderson, giving instructions to the hands on the top of the box cars as to the movements of his train. The train of which he was in charge was on the main track and backing towards him. He was looking at it as he gave the signals to the hands. On the side track a shifting

engine with two box cars attached was moving backwards at the rate of about four miles an hour in the direction of the intestate, his back being turned to the shifting engine. When the box cars attached to the shifting engine were within about twenty steps of the intestate he stepped from a safe place between the track upon the side track, with his back towards the shifting engine, and when engaged in giving orders to the men on the top of the box cars of his own train he was run over and killed by the box cars attached to the shifting engine. A person, Henry Thomason, who chanced to be passing by, endeavored to attract the attention of the intestate, by hallooing, to his peril, but to no avail. There was no watchman on the box cars of the shifting engine. The engineer, from his cab, could not have seen the deceased on the side track. There was no evidence that the bell was not ringing, nor any that the whistle was not sounding. The evidence was to the above effect, and we have recited it as true for the present case, for the plaintiff was non-suited, on the motion of the defendant, because his Honor deemed it insufficient to go to the jury on the question of the defendant's negligence.

We have no case in our Reports where the facts are similar to those in this case. In *Smith v. Railroad,* 131 N. C., 616, the plaintiff was employed by the defendant company to paint targets very near the defendant's track, and was injured by a shifting engine. Smith placed the paint bucket between the rail and his feet, and in the act of a second stooping over to dip his brush in the paint his head was stricken by a passing engine. The track was perfectly straight for six hundred feet and there was no obstruction of Smith's vision. The jury found there was no signal given, by bell or whistle. The Court said there that the engineer had a right to assume that the plaintiff would step out of danger if he had, peradventure, gotten too near the track, or that he would not put his head in danger by leaning over to dip his brush in the paint as the

engine was passing by. In that case neither the speed at which the engine was running nor the rules of the defendant company in reference to the notices and signals to be given by its engineers to persons at work on its tracks were considered, for they were not of importance in the trial as it was conducted in the Court below. When the case was before this Court again at February Term, 1903 (132 N. C., 819), it appeared from the then constituted case that the engine which struck Smith, the plaintiff, was moving at a rate of speed prohibited by city ordinance, and that the rules of the defendant company requiring the ringing of the bell or the sounding of the whistle to give notice to employees at work on the track were also introduced and formed an important part of the trial and case. In the case as last reported the Court held that the violation of the rules of the company and the rapid rate of speed of the engine were competent evidence to go to the jury to show negligence on the part of the defendant; and, in addition, it is also true that the Court cited numerous cases in which it was held that an employee of a railroad at work on its tracks had a right, outside of the rules of the company, to expect that engineers would keep a lookout and give proper signals of the approach of trains to prevent injury to workmen so engaged, and that the engineers should give such signals; and that may be considered as having been held by this Court to be the law in such cases. But that is not the case before us. Lassiter, the intestate, was not employed by the defendant to do work upon its track. He was, as we have said, a freight conductor, and he had a safe place in which to do his work. He, however, left that place and put himself in one of peril, and in doing that he was guilty of contributory negligence, and the plaintiff cannot recover in this action unless the defendant was also negligent and had the last clear chance to avoid the injury.

Was there any evidence of negligence on the part of the

defendant? If so, then his Honor was in error in granting the judgment of non-suit, unless it was perfectly evident that after the intestate stepped upon the track the defendant could not have stopped the train in time to prevent the injury, or have given warning to the intestate, through a flagman or watchman, by which he could have stepped off the track. It cannot be said that the time was too short, as matter of law, and if there was any evidence to show negligence on the part of defendant it should have been left to the jury as to whether or not the defendant had the last clear chance to avoid the killing of the intestate by keeping a proper look-out, notwithstanding the negligence of the intestate. We think there was evidence that ought to have been submitted to the jury as to whether or not the defendant was negligent. There was no watchman or flagman on the box cars of the shifting engine, or anywhere else, to give notice to the engineer of the peril of the intestate, and there was evidence that the engineer himself could not see the intestate on the side track.

It is the duty of railroad companies to keep a reasonable look-out on moving trains. When Thomason saw the intestate step upon the side track the end of the box car attached to the shifting engine was twenty steps from him and the cars were moving at the rate of four miles an hour. The same witness said that the intestate had time to have gotten off if he had heard the witness when he hallooed to him. That evidence was competent and fit to have been submitted to the jury upon the question of the last clear chance of the defendant—that is, whether if both the plaintiff and the defendant had been negligent the defendant could have prevented the death of the intestate by the use of means at hand or that reasonably ought to have been at hand. In *Pickett v. Railroad*, 117 N. C., 616; 53 Am. St. Rep., 611; 30 L. R. A., 257, the Court said: "If it is a settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving

train to maintain a reasonable vigilant outlook along the track in his front, then the failure to do so is the omission of a legal duty. If, by the performance of that duty, an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies v. Mann* and *Gunter v. Wicker,* the breach of duty was the proximate cause of any injury growing out of such accident, and when it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results. In *Arrowood v. Railroad,* 126 N. C., 629, the Court said: "The duty of keeping a look-out is on the defendant. If it can keep a proper look-out by means of the engineer alone, well and good. If for any reason a proper look-out cannot be kept without the aid of a fireman, he also should be used. If by reason of their duties either the fireman or the engineer, or both, are so hindered that a proper look-out cannot be kept, then it is the duty of the defendant at such places on its road to have a third man employed for that indispensable duty." The same doctrine was announced in *Jeffries v. Railroad,* 129 N. C., 236; *Bradley v. Railroad,* 126 N. C., 741, and *Pharr v. Railroad,* 119 N. C., 756.

In the present case it was of the utmost importance for the defendant to have kept a look-out other than that which the engineer ordinarily might keep, for the engineer here could not see in front of him by reason of the box cars, although the track was straight for some distance, and the view, but for the box cars, unobstructed. In *Purnell v. Railroad,* 122 N. C., 832, where the engine was pushing backwards a train of box cars, this Court said: "As we understand the matter, there must be both a man and a light at night, and a man and a flag in the day. * * * This man, called a flagman, is in control of this backing train. The train is moved and stopped at his discretion. This is done in the day-time by

the use of a flag, and at night by the use of the light. By these means he informs the man in control of the engine when and how to move the train."

The facts of this case do not bring it within the ruling made in *McAdoo v. Railroad,* 105 N. C., 140; *Meredith v. Railroad,* 108 N. C., 616; *Neal v. Railroad,* 126 N. C., 634, 49 L. R. A., 684, that it is not negligence in a railroad company, when its train runs over a man walking on the railroad track apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. The reason of that rule is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury. In this case the intestate, according to the evidence of Thomason, was at a disadvantage, was not upon equal opportunities with the defendant to avoid the injury, for his manner and conduct showed that he was oblivious to his surroundings and was engrossed in the management of his train and its hands. His actions showed that he did not hear the bell ringing. Now, if there had been on the backing box car a flagman, watchman, he would have seen the intestate's obvious absorption in his work and heard the efforts of Thomason to give him warning. The condition of the intestate was as helpless as if he had been asleep or drunk on the track, and the defendant owed him at least as high a duty as if he had been asleep or drunk.

Error.

DOUGLAS and WALKER, JJ., concur in result only.

IN RE ODUM.

(Filed October 27, 1903.)

1. CONTEMPT—*Waiver—Affidavits—Evidence.*

The failure to base proceedings as for contempt on affidavit is waived by the contemnor being sworn and making answer to the contempt.

2. CONTEMPT—*Findings of Court—Trial—The Code, sec. 654, sub-sec. 3—The Code, sec. 648.*

It is necessary in contempt proceedings for the trial judge to find the facts and file the same.

ACTION as for contempt against S. R. Odum, heard by Judge *R. B. Peebles* at February Term, 1903, of the Superior Court of SAMPSON County. From a judgment against the defendant he appealed.

J. D. Kerr and *G. E. Butler*, for the respondent.
No counsel *contra*.

MONTGOMERY, J. It was said in *In re Deaton*, 105 N. C., 59, that proceedings as for contempt should be based on affidavits. In the case before us that course was not pursued, but the contemnor, Odum, waived any rights he may have had by being sworn, at his own request, and making answer in that form to the charge that he had committed a contempt of the Court. But there is another irregularity in the proceedings which will preclude us from affirming the judgment of the Court below, although from a perusal of the record we are satisfied that the contemnor deserved the sentence which was imposed. His Honor failed to find the facts in the premises at the time he pronounced the judgment. There was evidence and also admissions to the effect that during the trial of a civil action before his Honor *Judge Peebles*, in the Su-

perior Court of Sampson County, at its February Term, 1903, in which the contemnor, Odum, was the defendant, he invited to his home one of the jurymen, Edward S. Herring, and entertained him all night; that he was seen with another one of the jurors, M. R. Mathis, alone and in a secluded place on the next morning before the Court convened; that the action was in debt, and the defendant's plea was that the judgments sued upon were on their face fraudulent and void; that his Honor instructed the jury that there was no evidence of fraud, either upon the face of the judgments or otherwise, and that if they believed the evidence they should find the issues in favor of the plaintiff; that the jury were expected to make a prompt return, but, remaining out some time, they were sent for and asked by the Court what the difficulty was; that Mathis replied that they could not agree as to how they had been instructed to find the first issue; that his Honor told them again that if they believed the evidence to answer the first issue $109.40, and put the amount in pencil on the margin of the paper on which the issues were written; and that in a short while the jury returned with their verdict, and through their foreman, Herring, answered $7.50 to the first issue.

If a finding of these facts had been made upon the evidence, and then a further finding of fact that it was the intention and purpose of Odum to corruptly and unlawfully influence the verdict of Herring and Mathis, we would deem the findings justified by the evidence, and would affirm the judgment. It was a case of unlawful interference with the proceedings in an action, and was punishable as for contempt under subsection 3 of section 654 of The Code.

It is true that in the judgment Odum's conduct was set out, but that was not sufficient. The facts should have been found and filed in the proceedings, especially that fact concerning the purpose and object of the contemnor, and the

judgment should have been founded on those findings. The judgment was in the following words: "It appearing to the Court that the action of Ira L. Kelly, as administrator of T. B. Bird, plaintiff, against Samuel R. Odum and others, defendants, was commenced on the 26th day of February, 1903, and that after the jury were empaneled in said case and charged not to talk about the case among themselves nor allow any one else to talk about it in their presence, the Court took a recess until 9:30 A. M. February 27, 1903, and that Samuel R. Odum carried Edward S. Herring, one of the jurors, on his buggy to Odum's house and kept him there all night, and brought him back to Court on February 27, 1903, and that before Court met on February 27, said Odum and one M. R. Mathis, another juror, were seen walking together through an alley in the town of Clinton. It is, therefore, considered and adjudged that said Samuel R. Odum, Edward S. Herring and M. R. Mathis are in contempt of Court, and it is further considered and adjudged that said Samuel R. Odum and Edward S. Herring be confined in the county for 30 days each, and that said Mathis pay a fine of $20."

Before the act of 1870-'71 (The Code, sec. 648), the matter set out in the judgment would have been a constructive contempt of Court, but that act excluded the offiense mentioned in the judgment from the list of contempts by mentioning specifically what acts should thereafter constitute contempt and excluding all other acts.

It is not necessary for us to discuss the appeal of Mathis and Herring, for before the appeal was taken, they had paid into Court the fines imposed by his Honor. A fine of $100 was, after the judgment, imposed upon Herring in lieu of the sentence of imprisonment.

We reverse the action of his Honor with reluctance.

Reversed.

STROUD v. WESTERN UNION TELEGRAPH COMPANY.

(Filed November 3, 1903.)

1. APPEAL—*Case on Appeal—Certiorari—The Code, sec. 550.*

Where the parties fail to agree on a case on appeal, and the appellant fails for two months to send the papers to the trial judge, the delay not being satisfactorily accounted for, a motion for *certiorari* to bring up the case will be denied.

2. APPEAL—*Transcript—Record—Supreme Court Rules 30, 34—Rules of Practice.*

Where the record and briefs are not printed within the time prescribed by Supreme Court Rules 30 and 34 the appeal will be dismissed.

ACTION by A. S. Stroud against the Western Union Telegraph Company, heard by Judge *W. R. Allen* and a jury, at June Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the plaintiff the defendant appealed.

John A. Barringer, for the plaintiff.

King & Kimball and *F. H. Busbee & Son,* for the defendant.

CLARK, C. J. This cause was tried at June Term, 1903, of Guilford Superior Court, and by consent of the parties thirty days were allowed to serve statement of "case on appeal," and thirty days thereafter to serve counter case. The counter case was served 15th August, being within the time specified. It was thereupon the duty of the appellant, unless he accepted the counter case, to "immediately request the Judge to fix a time and place for settling the case before him." The Code, sec. 550; *Simmons v. Andrews,* 106

N. C., 201. The appellant did not accept the counter case, and instead of "immediately" taking steps to bring the matter before the Judge that he might settle the case, the appellant took no action whatever to that end till 14th October, and shows no legal excuse for his laches. The Judge promptly settled the case on 17th October and sent it by express to the appellant, but it was not docketed here on the morning of 20th October, as required for that district, and the appellant on the opening of Court on that day moved for a *certiorari.*

The laches in failing to send the papers to the Judge immediately upon receipt of the counter case, and delaying to do so for two months, not being accounted for to our satisfaction, the motion for *certiorari* must be denied. *Peebles v. Braswell,* 107 N. C., 68; *Brown v. House,* 119 N. C., 622, and the counter motion to dismiss for failure to print the record and briefs within the time prescribed by Rule 34, 131 N. C., 831, and Rule 30, 128 N. C., 642, must be allowed.

Appeal dismissed.

SHANKLE v. INGRAM.

(Filed November 3, 1903.)

1. LIMITATIONS OF ACTIONS—*Covenants—Seizin—The Code, secs. 155, subsec. 9; 158, 152, subsec. 2—Warranty.*

In an action for damages for breach of covenant of seizin the statute of limitation begins to run upon delivery of the deed.

2. LIMITATIONS OF ACTIONS—*Warranty—Covenants—Ouster.*

In an action for the breach of a covenant of warranty the statute of limitation begins to run when there is an ouster of the grantee.

3. JURISDICTION—*Superior Court—Pleadings.*

It is the statement in good faith of a cause of action within the jurisdiction of the court that confers jurisdiction, and this jurisdiction, once acquired, is not lost by any subsequent elimination of the allegations of the complaint essential to its existence.

ACTION by Eli Shankle against E. N. Ingram and F. P. Ingram, heard by Judge *O. H. Allen* and a jury, at March Term, 1903, of the Superior Court of RICHMOND County. From a judgment for the defendants the plaintiff appealed.

Robert L. Smith and *John D. Shaw,* for the plaintiff.
Morrison & Whitlock, for the defendants.

WALKER, J. This is an action to recover damages for the breach of covenants in a deed. Plaintiff alleges in his complaint that in 1888 the defendants conveyed to him a tract of land in Richmond County containing 245 acres, being the lot set apart to Nannie Leak in the division of a larger tract. That the deed contained covenants of warranty and seizin in the usual form, and that at the time of the execution of the deed the defendants were not the owners of the entire premises, as they had in the year 1887 conveyed 41.8 acres of the land to one Jessie Reynolds, and that the plaintiff has not been permitted nor has he been able to occupy that part of the tract since the execution of the deed. He further alleges that by reason of the premises he has sustained damages in the sum of $170, which is the value of the 41.8 acres. The defendants in their answer deny the alleged breach of the covenants, and, among other defences, plead "that the plaintiff's action is barred by the statute of limitations, in that his cause of action arose more than ten years before the commencement of this action." The action was commenced on the 29th day of August, 1903. Plain-

tiff testified that he did not know of the deed to Reynolds until November 21, 1899, which was some time after the execution of the deed to him; that he copied the latter deed from the deed of Nannie Leak to the defendant, E. N. Ingram, and left it with the defendants to execute. The defendant, E. N. Ingram, testified that he told the plaintiff at the time of the sale that his land was bounded by Jesse Reynolds' land, and that the tract contained 200 acres. There was evidence tending to show that Jesse Reynolds was in adverse possession of the 41.8 acre tract, at the time the plaintiff bought the land and received his deed, claiming it under the Ingram deed. It is not necessary to state any more of the evidence in order to present the point decided in the case. Issues were submitted to the jury, which, with the answers thereto, are as follows:

1. Did the deed include the 41.8 acres previously conveyed to Reynolds by the mutual mistake of the parties? No.

2. Was the said 41.8 acres inserted in the deed by fraud on the part of the plaintiff? No.

3. Is the plaintiff's cause of action barred by the statute of limitations? Yes.

4. What damages, if any, is the plaintiff entitled to recover? Not answered.

The plaintiff requested the Court to charge the jury as follows:

First. That it appearing from the evidence that there was a mistake or fraud in the deed from the defendant to the plaintiff, the plaintiff had three years in which to bring his action after the discovery of said mistake or fraud.

Second. That if the jury believe the evidence, the plaintiff brought his action within less than three years after the discovery of the facts constituting such mistake or fraud, and therefore the plaintiff's action is not barred by the

statute of limitations, and they should answer the third issue "No."

Third. That the ten years statute of limitations as pleaded by the defendant is not applicable to this action.

These instructions were refused by the Court and the plaintiff excepted.

The decision of the case turns upon the question whether the three years statute, The Code, sec. 155 (9), or the ten years statute, The Code, sec. 158, applies to the plaintiff's cause of action. The action was brought upon the covenants in the deed and not upon the theory that there was any fraud or mistake in the deed, nor upon the theory that the defendant had made a fraudulent representation as to the quantity or acreage, which would entitle the plaintiff to recover damages for deceit. It is perfectly clear that the pleader, when he drew the complaint, intended to declare upon the covenants or in contract, and not in tort. If he intended to sue in tort, as for deceit, his allegations are not appropriate and sufficient for such a purpose, and we find nothing in the evidence, upon a careful examination of it, to support any such cause of action, under the well settled principle applicable to cases of that kind. There is neither allegation nor proof fit for that purpose. *Walsh v. Hall,* 66 N. C., 233; *Ethcridge v. Vernoy,* 70 N. C., 718; *Anderson v. Rainey,* 100 N. C., 321. If there had been proof, it would not be sufficient, for proof without allegation is as ineffectual as allegation without proof to sustain it. There must be both allegation and proof to entitle a party to the relief he seeks. *McKee v. Lineberger,* 69 N. C., 217. Indeed, upon the evidence as stated in the record, we think the cause of action set forth in the complaint was well conceived. If the plaintiff had any cause of action, it was for a breach of the covenants, and the complaint in that view of the case is aptly and skillfully drawn.

The Court in its charge upon the first and second issues gave the plaintiff the full benefit of the proof, as if he had alleged the fraud or mistake in his complaint and the proof tended to establish such a case, and upon these issues the jury found against the plaintiff. The charge of the Court, therefore, was more favorable to the plaintiff in that respect than it should have been, and he had no good reason to complain of it. The Court should not have submitted the first two issues to the jury at all, as there were no allegations in the complaint upon which they could be founded if there had been any evidence to sustain them. Issues should not be submitted on evidence alone; they arise out of the pleadings and should correspond with them.

As the plaintiff elected to sue upon the covenants in the deed, and it appears from the evidence that he had no other valid cause of action, his right of action accrued to him, as to the covenant of seizin, when the deed was delivered, as that covenant is trictly one for title (*Price v. Deal,* 90 N. C., 290), and, as to the covenant of warranty, although it is a covenant for possession or for quiet enjoyment (*Price v. Deal*) the right of action upon the facts of this case also accrued at the time of the delivery of the deed, because the pleadings virtually imply, and the evidence tends to show, that Jesse Reynolds was in adverse possession at that time, claiming the land under the deed from Ingram, which, being prior in date to the deed of Ingram to the plaintiff, conferred upon Reynolds the better title, nothing else appearing. In other words, while his right of action upon the covenant of warranty accrued only when there was an ouster, the adverse possession of Reynolds under a good title was equivalent to an ouster, and, it having existed when the deed was delivered, the accrual of the right of action must date from that time. *Grist v. Hodges,* 14 N. C., 198; *Hodges v. Latham,* 98 N. C., 239; 2 Am. St. Rep., 333.

The statute of limitations commences to run, of course, from the accrual of the right of action. As this action is upon the covenants and is not based upon the idea of fraud or mistake, which would entitle the plaintiff to sue at law or in equity, according to the nature of his suit for relief, and, as the three years statute cannot therefore apply (*Burwell v. Linthicum,* 100 N. C., 149), the action is barred, a sufficient time having elapsed since the cause of action accrued, as above indicated, to defeat the plaintiff's right of recovery. The Code, sec. 152 (2). As the complaint contains no allegation or suggestion of fraud or mistake, the action, so far as it can be affected by the statute of limitations, is not unlike any other ordinary action for damages upon a broken covenant.

Although no reference was made to the matter in the argument, we have examined the record with a view of deciding whether the Court below had jurisdiction of the action, and have concluded, upon an inspection of the pleadings, that there was a sufficient controversy affecting the title to real property to confer original jurisdiction upon the Superior Court, and, especially, in view of the well settled principle that the jurisdiction of that Court must be determined by the facts as stated in the complaint. It is the statement in good faith of a cause of action, which is, on its face, within the jurisdiction of the Court, that confers the necessary jurisdiction to proceed in the case, and this jurisdiction once acquired is not lost by any subsequent elimination of the allegations of the complaint, which were essential to its existence, whether by pleadings, as in the case of an answer or demurrer, or by failure of proof, or in any other way. *Martin v. Goode,* 111 N. C., 288; 32 Am. St. Rep., 799; *Sloan v. Railroad,* 126 N. C., 487.

We do not well see how a justice of the peace could have taken cognizance of the questions involved in this case and

administered the rights of the parties, and we presume this view was taken by counsel, as no objection was made to the jurisdiction either below or in this Court.

We find no error in the rulings of the Court below.

No error.

LOCKLEAR v. BULLARD.

(Filed November 3, 1903.)

1. PLEADINGS—*Ejectment—Allegata et Probata—Deeds—Mortgage—Fraud—Mistake—Ejectment.*

A defendant in an action for the recovery of real property cannot show that a deed in the chain of his adversary's title, absolute in form, was a mere mortgage, unless he expressly pleads it.

2. LIMITATIONS OF ACTIONS—*Adverse Possession—Tenancy in Common—Ejectment—The Code, sec. 166.*

An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the co-tenant then out of possession.

ACTION by J. Locklear against Elias Bullard and others, heard by Judge *O. H. Allen* and a jury, at September Term, 1902, of the Superior Court of ROBESON County. From a judgment for the plaintiff the defendants appealed.

John D. Shaw, Jr., and *A. W. McLean*, for the plaintiff.
McIntyre & Lawrence, for the defendants.

WALKER, J. This is an action for the recovery of real property. The plaintiff in his complaint alleges that he is the owner of the land, that the defendants are in possession thereof and unlawfully and wrongfully withhold the pos-

session of the same from him. The defendants simply denied these allegations, no special defense of any kind being pleaded.

The plaintiff, who claims title in three different ways, in order to establish his title to the land, introduced the following documentary evidence: 1. A grant from the State to Robert Locklear and a deed from the latter to Elizabeth Locklear. He then proved that he is the only child and heir at law of Elizabeth Locklear. 2. A deed from James Bullard, father of the defendants, to W. F. Buie, and a deed from W. F. Buie to the plaintiff. 3. The plaintiff then introduced evidence tending to prove that James Bullard and the defendants, who claim under him, entered upon the land, under the plaintiff, as tenants or permissive occupants, and he contended that they were, therefore, estopped to deny his title. 4. The plaintiff further introduced evidence which tended to prove that he and those under whom he claimed had been in the adverse possession of the land under color of title for more than twenty years prior to the commencement of this action. It was conceded that the title to the land was out of the State.

The defendants introduced evidence tending to show that the deed from James Bullard to W. F. Buie was in fact intended to be a mortgage, but by mistake was drawn and executed as an absolute deed. They admitted that the land west of Juniper swamp belonged to the plaintiff, but averred and introduced evidence to prove that the land lying on the east side of the swamp had been in the possession of themselves and those under whom they claimed for twenty years prior to the commencement of this action.

Plaintiff replied to the last contention of defendant by introducing the record of an action brought by him against Burdie Bullard, son of James Bullard, and brother of the defendant, Elias Bullard, on September 10, 1894, for the

recovery of the possession of the land now in controversy, in which action a judgment of non-suit was entered at September Term, 1899. He then proved that within one year after the non-suit was entered he commenced this action. At the trial there was a verdict for the plaintiff and judgment was entered thereon, from which the defendants appealed, alleging numerous errors as having been committed by the Court during the course of the trial.

In this Court the defendants abandoned, and we think properly, all but two of their exceptions, and these two related to the charge of the Court in regard to the alleged mortgage from Bullard to Buie and the effect of the evidence of the suit of the plaintiff against Burdie Bullard upon the adverse possession of the defendants as a bar to the plaintiff's recovery.

1. The defendants proposed to show that the deed from James Bullard to W. F. Buie, which was absolute in form, was intended to be a mortgage and was given to secure the repayment of money advanced by Buie to James Bullard. They were permitted by the Court to introduce testimony for this purpose, and upon the evidence as introduced, the Court charged the jury that before they could find that the deed was intended as a mortgage they must be satisfied by clear and convincing proof, not only that the parties intended it to be a mortgage, but that the clause of redemption was omitted by fraud or mistake. The defendants excepted to this charge. If there was any error in this instruction of the Court, the defendants are not in a position to complain of it. They had answered the complaint by a general denial of the allegation of the plaintiff, and have not specially pleaded the facts which would entitle them to an issue for the purpose of ascertaining whether the deed was intended as a mortgage and of having it corrected and converted from an absolute deed into a mortgage, if it was the purpose of

the parties that it should be merely a security for the money advanced by Buie to Bullard. An equity of this kind cannot be made available to the party who claims it, unless it is expressly pleaded. *Fisher v. Owens,* 132 N. C., 686; *Norris v. McLane,* 104 N. C., 159. In such cases it is an invariable rule that proof without allegation is as fatal as allegation without proof. There must be both allegation and proof to entitle the party to relief. *McLaurin v. Cronly,* 90 N. C., 50; *Young v. Greenlee,* 82 N. C., 346; *Helms v. Green,* 105 N. C., 251; 18 Am. St. Rep., 893; *McKee v. Lineberger,* 69 N. C., 217; *Abernathy v. Seagle,* 98 N. C., 553. A party cannot attack a deed in the chain of his adversary's title by evidence, without corresponding allegation, unless there was fraud in the factum or execution of the deed, or unless for some other reason the deed is open to collateral attack. *Helms v. Green, supra.* When, under the former system of procedure, a party would have been obliged to resort to a court of equity for relief, he must now set up the equity in his complaint or answer, as the nature of the case and his position on the record may require. *McLaurin v. Cronly, supra.*

2. It was conceded, so far as the next contention of the defendants is concerned, that if the time of the pendency of the suit of *Locklear v. Bullard* should be excluded from the count, the alleged adverse possession of the defendants and those under whom they claimed had not continued long enough to ripen their title and bar the plaintiff's recovery. We think the time of the pendency of that suit should be excluded from the count in ascertaining the length of the defendant's adverse possession, if there was any such adverse possession. Assuming that Burdie and Elias Bullard were tenants in common, the possession of Burdie Bullard was, in law, the possession of his co-tenant. *Tharp v. Holcomb,* 126 N. C., 365. It was only by virtue of the posses-

sion of Burdie Bullard that the defendant Elias Bullard can claim that adverse possession had ripened his title. The statute provides that if suit be commenced within the time prescribed therefor and the plaintiff be non-suited, he may bring a new action within one year from such non-suit. The Code, sec. 166. The reason of the law is that the running of the statute should, in the very nature of things, be arrested as soon as the party has asserted his right by action, and in this case it appears that the plaintiff sued him who was in possession and who represented the defendant Elias Bullard, and it would seem, therefore, that the operation of the adverse possession as a bar to the plaintiff's right or title could not have been more effectually prevented. The defendant, Elias Bullard, will not be permitted to say that the adverse possession of his brother enures to his benefit, and at the same time repudiate the burden that necessarily accompanies it or is a consequence of it. If he seeks to profit by the adverse possession he must also bear its burden, and anything that will interrupt or suspend the running of the statute as to his brother must be held to affect his right precisely to the same extent and in the same degree. This follows from the nature of the relation of the parties to each other. If Elias Bullard claims that Burdie Bullard did not represent him and stand for him while in possession, then he is met by the difficulty, which he cannot overcome, that he had no possession at all; so that in either view, whether Burdie Bullard represented him or not, he will lose. *Clymer v. Dawkins*, 3 How. (U. S.), 674.

We must hold that it was the assertion of the plaintiff's right to the possession in that action that stopped the running of the statute, for it was the possession that was building up the title for the defendants and gradually destroying that of the plaintiff, and when the plaintiff's inaction ceased by the assertion of his right to the possession, he should no

longer be held to have been injuriously affected by the continued possession of the defendants pending the suit. It seems to us that it would be strange indeed if this were not so. The adverse possession set the statute in motion, and we can conceive of no valid reason why an action to recover the possession should not suspend its operation.

It appears to have been settled by authority in this State that it can make no difference who was in possession at the time the first action was brought. It was the bringing of the action which was equivalent to entry and which stopped the running of the statute, without regard to who the particular occupant at the time may have been. In *Williams v. Council,* 49 N. C., 211, this Court, through *Pearson, J.,* says: "We do not think that the defendant in the new action must be the same person as the defendant in the former action; for if so, the plaintiff might be deprived of the benefit of this saving, without any fault or laches on his part; the defendant in the first action would have nothing to do but give place to another tenant of the same landlord, or he might convey to a third person, or leave the premises vacant and let a third person enter, and thus force the plaintiff to bring a new action against a different defendant; and it would be absurd to suppose that the defendant in the second action might insist upon the possession of the defendant in the former action as a bar to the plaintiff's right of entry, although the latter, had he continued in possession, could not, by force of the proviso, have availed himself of his own possession."

This view of the statute is fully set forth, and with great clearness, by *Ruffin, C. J.,* in *Long v. Orrell,* 35 N. C., 130, where it is said by the Court: "If an action within the year would not lie against a stranger who entered when the possession was vacant, there would be the absurdity that he could insist on the possession of a former tenant as a bar,

which the former tenant himself could not set up, had he continued in possession. Such consequences forbid a construction which produces them; and they show the true principle of the enactment to be, that by bringing ejectment, a party then having the right of entry shall continue to have it as long as that action pends, and afterwards, also, if, within one year afterwards, he will bring another action, and so on, from time to time."

This principle, which seems to be thoroughly settled, applies with great force to a tenant in common out of possession, who is said to be represented by his co-tenant in possession, as his bailiff. *Jolly v. Bryan,* 86 N. C., 457. The possession of one tenant in common is the possession of the other. *Cloud v. Webb,* 14 N. C., 326; *Clymer v. Dawkins, supra.*

We find no error in the ruling of the Court below.

No error.

SOUTHPORT, WILMINGTON AND DURHAM RAILROAD COMPANY v. OWNERS OF THE PLATT LAND.

(Filed November 3, 1903.)

1. EMINENT DOMAIN—*Damages—Railroads—The Code, secs. 1946, 1945, 1943, 1944—Acts 1891, ch. 176—Acts (Private) 1891, ch. 135, sec. 16—Acts (Private) 1883, ch. 111, sec. 37.*

   In the assessment of land taken for railroad purposes special benefits to the land and not benefits received in common with other property should be considered in reduction of the award for damages.

2. EMINENT DOMAIN—*Damages—Railroads.*

   The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive.

ACTION by the Southport, Wilmington and Durham Railroad Company against the owners of the Platt land near

Southport, heard by Judge *C. M. Cooke,* at March Term, 1903, of the Superior Court of BRUNSWICK County. From a judgment for the defendant the plaintiff appealed.

Guthrie & Guthrie, for the plaintiff.
Russell & Gore and *Davis & Davis,* for the defendant.

CONNOR, J. This is a proceeding instituted for the purpose of acquiring, by condemnation, thirty-six acres of land belonging to the defendants for the use of the plaintiff for "terminal facilities for the purpose of constructing a proposed railroad," etc. The proceeding was commenced by summons and conducted in all respects in accordance with the provisions of chapter 49, section 1945-46 of The Code. The Commissioners were duly appointed "to appraise, according to law, the value of the land sought to be condemned and the value of the benefit to accrue to the owners of the remainder of the tract of land, from which the land sought to be condemned is to be taken," by the construction and operation of the plaintiff's railroad. Pursuant to the order the Commissioners met on the land and viewed the premises described in the petition and heard the allegations and proofs. They reported to the Court that they had valued the land sought to be condemned at $150 per acre, aggregating $5,700; that they "appraised the value of the benefits to accrue to the remainder of the tract of land from which said thirty-eight acres is taken, at the sum of $——, no value except in common with surrounding lands." Upon the coming in of the report the petitioners filed two exceptions thereto. The Clerk overruled both exceptions and confirmed the report; the petitioners excepted and appealed to the Superior Court in term. Upon the hearing on the appeal the petitioners withdrew the first, and the cause was heard upon the second exception, to-wit: "The petitioner further excepts

to said report of the commissioners for that they have not appraised any benefits, as they should have done, for benefits to accrue to the remainder of the tract of land from which said thirty-eight acres are taken, and, further, that the commissioners have returned as their finding, as to benefits to accrue to the balance of the tract, that it has no value except in common with surrounding lands, and upon this exception the petitioners demand a jury trial at term time." His Honor overruled the exception and affirmed the judgment of the Clerk, and the petitioners appealed.

The petitioners' contention before his Honor, and in this Court, as set forth in the case on appeal, is that "the commissioners proceeded upon an erroneous view of the law pertaining to the appraisement of benefits in such cases as is provided by the Public Laws of 1901, chapter 160, amendatory of The Code, sec. 1946, chapter 49; that the rule for assessing benefits in such cases, as provided in The Code, sec. 1946, chapter 49, was changed by the Public Laws of 1891, and the appraisers should have allowed such benefits as might accrue to the balance of the tract, whether such benefits were common to adjoining land owners and not peculiar to the Platt lands." For the purpose of deciding the very interesting question presented by the exception and the appeal from his Honor's judgment, it is necessary to review the legislation in this State and the decisions of this Court.

In *Railroad v. Davis,* 19 N. C., 451, it was held that while there was no provision in our Constitution prohibiting the taking of private property for public use without compensation, the principle embodied in such a provision was so salutary to the citizen, and concerned so nearly the character of the State, that it might well be urged that it must be consecrated by its adoption in some part of the free Constitutions of this State. The Court should be reluctant to pronounce judicially their inability to find it in that instrument. If

it be not incorporated therein the omission must be attributed to the belief of the founders of the government that the Legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen." The Court further says: "It is not deemed probable, and with difficulty conceived to be possible, that the Legislature will at any time take the property of the citizen for public use, without at the same time providing some reasonable method of ascertaining a just compensation, and some certain means of paying it."

Mr. Justice Rodman in *Johnson v. Rankin,* 70 N. C., 555, says: "The principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina."

The question presented upon this appeal first came before this Court in the case of *Freedle v. Railroad,* 49 N. C., 89, and it arose upon the construction of the language of the charter of the North Carolina Railroad Company, which is as follows: "In making said valuation the said commissioners shall take into consideration the loss or damage which may accrue to the owner or owners in consequence of the land or the right of way being surrendered, and the benefit or advantage he, she or they may receive from the erection or establishment of the railroad or work, and shall state particularly the value and amount of each, and the excess of loss and damage over and above the advantage and benefit shall form the measure of valuation of the said land or right of way," as to whether "the compensation was subject to a deduction by making an allowance for the general benefits of the road, for instance, increased facilities for getting to market and traveling, increased prosperity of the country, stimulus to industry, more densed population and a consequent appreciation in the value of real estate; or

whether only such benefits should be deducted as were peculiar to the owner of the land, a part of which was taken for the use of the road."

Pearson, J., speaking of the language of the charter, says: "The words of the charter are satisfied by making a deduction for such benefits as are peculiar to the owner of the land, but they are broad enough to take in such benefits as are common to all. This raises a question of construction." After discussing the question the Court proceeds to say: "We are satisfied from 'the reason of the thing,' and from further consideration, that such general benefits and anticipated advantages are too 'contingent, uncertain and remote' to be made the basis of any practical rule, that the commissioners ought not to have taken into their estimate these benefits and advantages, which are common to all, and that the proper construction of the charter confines the deduction to such benefits and advantages as are peculiar to the particular tract of land in each instance."

This principle was approved in *Railroad v. Wicker,* 74 N. C., 220, in which the charter of the Chatham Railroad Company was construed. The language of the charter in that respect being that "the said commissioners shall take into consideration the loss or damage which may accrue to the owner or owners in consequence of the land or right of way being surrendered, and the benefit or advantage he, she or they may receive from the erection or establishment of the railroad or works, and shall state particularly the value and amount of each, and the excess of loss or damage over and above the advantage and benefit shall form the measure of valuation of said land or right of way." *Rodman, J.*, says: "It is an admitted rule that all special grants of special benefits and privileges, whether to corporations or to individuals, contrary to the general law, are to be strictly construed, and will not be enlarged against the public intendment.

All such grants must be interpreted with and in subordination to the general law, unless it clearly appears that the Legislature intended to depart from the general law and to repeal it as respects the particular grantee, and to confer on him popular privileges. * * * The rule with respect to the assessment of damages to land taken for railroads, upon the point under consideration, is settled in this State, *Freedle v. N. C. R. R. Co.,* 49 N. C., 89, and has been recognized in so many States that it may now be taken as the general law of the United States," citing Cooley Const. Lim., 565, and a number of cases from other States. The learned Justice then proceeds to say that "the rule as gathered from the cases cited is this: 'The jury shall not deduct from, or set off against, the damages special to the land, a part of which is taken, any benefits arising from the railroad under construction, which are common to the owner and to all other persons in the vicinity, but may deduct or set off any benefits peculiar to the land. The charter may without violence be interpreted as meaning to express this rule, and, if it does, it is in conformity to the general law."

We must, therefore, take the law as settled in this State prior to 1872, as announced in that case. The Legislature at its session of 1871-'72, ch. 138 (incorporated into The Code as chapter 49, entitled "Railroads and Telegraph Companies"), provided for the construction of railroads and telegraph companies. Sections 1943-4-5 prescribe proceedings for the condemnation of land for the use of railroad companies organized under the provisions of the statute. Section 1946 provides that the commissioners appointed shall meet upon the premises described in the petition, hear proofs and allegations of the parties and reduce the testimony to writing, and shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the property appraised by

them, and *in determining the amount of such compensation they shall not make any allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad.* This provision clearly operated to change the rule in respect to the assessment of benefits and to prohibit the assessment of any benefits whatever, allowing the owner full compensation and value for it, without any allowance or deduction for benefits or advantages, whether special and peculiar to the land or common to the other lands in the vicinity.

The General Assembly at its session of 1891 (Laws 1891, ch. 160), amended the said law as follows: "That section 1946 of The Code be and the same is hereby amended by striking out all after the word "them" in line 21 of said section, down to and including the word "railroad" in line 24; provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the railroad company shall pay the cost of the proceeding, and shall not have a judgment for the excess of benefits over damages." Section 1946, as thus amended, makes it the duty of the commissioners "to ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them." Referring to the several railroad charters in this State, we find that the language used in the charter of the Wilmington and Raleigh Railroad Company is that "the jury shall consider what damages the owners of the land shall have sustained."

The amendment of the act of 1871-'72, chapter 49 of The Code, restores the rule laid down by this Court in Freedle's case and in Wicker's case, *supra*, and his Honor's ruling was in accordance therewith.

Counsel for the petitioners concede that prior to the passage of the act of 1891, save for the provisions of The Code,

this was the law, and his Honor's ruling was in accordance therewith, contending, however, that the amendment of 1891 authorizes the assessment of common benefits in addition to special benefits. Mr. Lewis, in his work on Eminent Domain, in the classification of the States holding the several views upon the manner of assessing benefits in condemnation proceedings, places North Carolina with those holding that special benefits only may be set off against both the value of the property taken and damages to the remainder, including in this class the courts of Connecticut, Kansas, Maine, Minnesota, Massachusetts, Missouri, New Hampshire, New Jersey, Pennsylvania and Vermont.

The law being thus settled in North Carolina prior to the act of 1871-'72, we must construe the amendment of 1891 as restoring the law as announced prior thereto, the rule being as we have heretofore shown. The purpose of the act of 1871-'72 was clearly to prohibit the assessment of any "real or supposed benefits." This being stricken from the act makes it the duty of the commissioners to assess to the land owner "just compensation," and this language has frequently been construed to mean "the value of the land subject to such special benefits as may accrue to the remainder of the tract." This view is strengthened by the opinion in *Miller v. Asheville,* 112 N. C., 759. Section 37 of the Private Laws 1883, ch. 111, provides that for the purpose of opening and widening streets in the city of Asheville, proceedings for condemnation may be instituted and a jury appointed, who shall view the premises and assess the damages which shall be sustained by the opening or widening of the street, and also take into consideration "any special benefit, advantage or enhanced value which may, in their judgment, accrue to any premises," etc. By the Private Acts 1891, ch. 135, sec. 16, this language was so amended that it became the duty of the jury to consider "all benefits special to said land,

and also all benefits, whether real or supposed, which the parties may derive from the construction of said improvments, whether it be common to other lands or only special to their own." This latter act was passed after the institution of the proceedings for the condemnation in Miller's case. His Honor, upon the theory that the act of 1883 controlled, charged the jury that the benefits assessed must be only those "which are special to the owner and not such as he shares in common with other persons." This Court, speaking through *Mr. Justice Clark,* said: "The rule laid down by his Honor has been the settled ruling of this Court, but it was expressly altered as to all condemnation proceedings instituted in behalf of the defendant by section 16, chapter 135, Private Acts of 1891"—the Court holding that the latter act applied. We have examined with some care the decisions of other courts, and while not necessary to sustain the unanswerable reasoning of *Pearson, J.,* in Freedle's case, *supra,* we think they fully sustain the doctrine, as held by this Court, that, in the absence of any express language to the contrary, only special benefits can be deducted from the compensation or damages assessed against the corporation. This rule seems to us eminently just and in accordance with the rule for the construction of statutes providing for proceedings to condemn private property under the right of eminent domain. While this Court will always give a fair and reasonable construction to statutes, it will not lose sight of the well-settled principle that all statutes in derogation of common right are to be strictly construed and for the protection of the citizen, not abridging the essential right of eminent domain, but confining it to limits which the Elders, in their jealous regard for the rights of private property, have laid down. We may not, listening to suggestions of the public necessity, forget that the most permanent and the wisest institutions of government are designed for the protection of private property and per-

sonal liberty. A citizen must surrender his private property in obedience to the necessities of a growing and progressive State, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public.

The petitioners contend, however, that, as the land taken was for a depot and terminal facilities, necessarily the land which remained to the owners must have received some special benefit. However this may be, the finding of the commissioners is conclusive.

We do not understand that the suggestion contained in the exception, that the petitioners demanded a jury trial, was pressed. In the assignment of error the petitioners suggest only that the commissioners adopted an erroneous rule of law, and there is no assignment of error in this Court in regard to a trial by jury. We therefore do not pass upon it.

The judgment should be

Affirmed.

STEWART v. PERGUSSON.

(Filed November 3, 1903.)

TAX TITLES—*Deeds—Internal Revenue—Rev. Stats. U. S., secs. 3182, 3183, 3188, 3197, 3199, 3203—The Code, sec. 1267.*

A purchaser claiming land under a sale for internal revenue taxes against the owner cannot sustain his title under the deed of the collector if he fails to show independently of the mere recitals in the record or in his deed that a return was made by the person liable to be assessed, or that the commissioner of internal revenue had made the assessment, or that a warrant of distraint had been issued, or that a certificate of purchase had been given to the purchaser at the sale.

CLARK, C. J., dissenting.

ACTION by J. T. Stewart against J. M. Pergusson and others, heard by Judge *T. J. Shaw* and a jury at October Term, 1902, of the Superior Court of STOKES County.

This is a special proceeding, commenced before the Clerk of the Superior Court, in which the petitioner prays that a sale be ordered of his intestate's land for the payment of debts. The case was transferred from the Clerk to the Superior Court at term for the trial of the issues raised by the pleadings.

The petition is in the usual form, and its allegations, which were sufficient to entitle the petitioner to the relief demanded, were sustained by the evidence, if the jury believed it.

The heirs of the intestate, who are defendants, made no resistance to the order, but the defendant, J. M. Pergusson, answered and alleged that he purchased the land at a sale of the same for taxes by the Collector of Internal Revenue for the district in which it is situated. The decision of the case turns upon the validity of that sale. Upon that question, as will appear hereafter, the Court charged adversely to the de-

fendant. It will be necessary to reproduce so much of the case only as will show the state of the evidence upon which that charge was given. The defendant introduced what is called a "supplemental report of seizures and sales of real estate in the Fifth Collection District of North Carolina for the month of March, 1897," it being known in the case as "Exhibit A." This report was made by the deputy collector and contains a statement by him that a certain amount of taxes had been assessed against several packages of spirits, the property of W. B. Dodson, Sr., the plaintiff's intestate, and that he had served upon the latter a notice and demand for the same on February 27, 1897. It is also stated in the report that the date of the warrant of distraint and the date of its return are unknown, but that the warrant was directed to the deputy collector, and that the land was advertised at three public places in the county for sale on the premises; that the sale was made on March 29, 1897, for $50 to the defendant, J. M. Pergusson, but that no certificate of purchase was ever issued to him. Defendant then offered to introduce in evidence a deed from the collector to said Pergusson, reciting in the premises or preamble that an assessment for the amount due the United States on account of the stamp tax on spirits had been made, and that there had been a default by the intestate in payment, after due and lawful notice of the same and demand for the payment thereof, and that the land had been seized under a warrant of distraint issued by the then collector and sold to the highest bidder for the taxes and accrued costs, and that at the sale the defendant Pergusson became the purchaser of the land. The deed further recites generally that the provisions of the law in such cases made and provided had in all respects been complied with. The land is then conveyed "by virtue of the power vested by law" in the collector to the said Pergusson in fee with special warranty. The deed is signed by H. S. Harkins, Collector

of Internal Revenue, without any seal opposite his name, but the word "seal," with a scroll around it, appears at the left of the signature, and it is stated in the testimonium clause that he had set his hand and affixed his official seal to the deed.

The defendant then proposed to introduce in evidence a report of collections for March, 1897, made by the deputy collector (who seems to have seized the property and conducted the sale) to the collector. In this report, so far as it relates to the intestate's land, is set forth the amount of taxes, penalties, interest, costs due on warrant of distraint against said land, the cost of advertising the sale, the amount of the purchase price and the name of the purchaser, and the report closes with a statement of the total amount of collections on account of the assessments, together with costs and expenses. There was no certificate of authentication annexed to this report. The plaintiff objected to the admission of this evidence; the objection was sustained, and defendant excepted.

The deputy collector who made the sale testified that he notified the intestate of the assessment and that intestate waived a seizure and sale of his personal property and told him to sell his land and make the money. He identified the report which was excluded by the Court as the one he made to the collector. He then stated that the deed of the collector, H. S. Harkins, who was successor to S. L. Rogers, the collector in office at the time the sale was made, and which was dated August 19, 1898, was actually executed more than twelve months after the sale. He further testified that Pergusson had paid him the purchase money, but he did not state when it was paid. There was evidence tending to show that the intestate, at the time of the levy or seizure of the land, had personal property sufficient to pay the taxes, and that, after the death of the intestate, the defendant Pergusson took possession of the land. There was also evidence tending to show that the sale of the land had not been advertised in the

newspaper more than eighteen days. The Court charged the jury that if they believed the evidence they should answer the issues in favor of the plaintiff. The issues and the answers thereto are as follows:

1. Was plaintiff's intestate seized in fee of the land described in the complaint, as alleged in the complaint? Ans. Yes.

2. Did plaintiff's intestate have sufficient personal property to pay off the debts of said intestate and the costs of the administration? Ans. No.

We have not set forth any of the evidence relating to the second issue, as it is not material in the view we take of the questions involved.

From a judgment for the plaintiff the defendants appealed.

Lindsay Patterson and *W. W. King,* for the plaintiff.
Watson, Buxton & Watson, for the defendants.

WALKER, J. (after stating the facts). We are of the opinion, upon the foregoing statement of the case, that the title of the intestate, W. B. Dodson, Sr., was not divested by the sale for taxes. It is provided in the Revised Statutes of the United States as follows: "The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments, when made, to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified." Sec. 3182. "It shall be the duty of the collectors or their deputies in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be desig-

nated." Sec. 3183. "All returns required to be made by any person liable to tax shall be made on or before the tenth day of each month, and the tax assessed or due thereon shall be returned by the Commissioner of Internal Revenue to the collector on or before the last day of each month." Sec. 3185. "If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes by distraint and sale in the manner hereinafter provided." Sec. 3187. "In such case of neglect or refusal the collector may levy or, by warrant, may authorize the deputy collector to levy upon all property and rights to property, except such as are exempt, belonging to such person." Sec. 3188. "When distraint is made as aforesaid the officer charged with the collection shall make or cause to be made an account of the goods or effects distrained, a copy of which, signed by the officer making such distraint, shall be left with the owner or possessor of such goods or effects, or at his dwelling or usual place of business, with some person of suitable age and discretion, if any such can be found, with a notice of the sum demanded and the time and place of sale." Sec. 3190. The law then provides for a public sale of the property distrained to the highest bidder, and requires, when the same is not bid in for the government, that the collector shall give to the purchaser a certificate of purchase, "which shall set forth (1) the real estate purchased; (2) the name of the person for whose taxes the same was sold; (3) the name of the purchaser, and (4) the price paid therefor; and that if the said real estate be not redeemed in the manner and within the time prescribed, the said collector or deputy collector shall execute to the purchaser, upon a surrender of the certificate, a deed of the real estate purchased by him as aforesaid, reciting the facts set forth in said certificate and in accordance with the laws of the State in which such real estate is situate

upon the subject of sales of real estate under execution." Rev. Statutes, secs. 3197 and 3198. It is further provided that "the deed of sale given in pursuance of the preceding clause shall be *prima facie* evidence of the facts therein stated, and if the proceedings of the officer have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real estate thus sold." Sec. 3199. Provision is also made for keeping a record in the collector's office of all seizures and sales, which record is required to be certified by the officer who made the sale. A copy of said record, duly certified by the collector, is made evidence of the truth of the facts therein stated in any court. Sec. 3203.

It appears in this case that there was no evidence, and certainly no competent evidence, to show that a return had been made by the party liable to be assessed, or that the Commissioner of Internal Revenue had made the assessment, or that a warrant of distraint had been issued, or that a certificate of purchase had been given to the purchaser at the sale, all of which must appear, not merely by recital in the records or in the deed, but by independent proof. *Hopper v. Maleson,* 16 N. J. Eq., 382. There are other defects in the proceedings leading up to the sale of the land, but those above pointed out are fully sufficient to invalidate the sale.

It is well settled that a purchaser at a tax sale must show strict compliance with all the substantial or material requirements of the law under which the sale was made, in order to establish his claim that he has acquired the title of the owner. *Avery v. Rose,* 15 N. C., 549; *Taylor v. Allen,* 67 N. C., 346; *Ronkendorf v. Taylor,* 4 Pet., 341; *Early v. Doe,* 16 How., 618; *Cox v. Stafford,* 90 N. C., 698; *Jackson v. Shepard,* 7 Cowen (N. Y.), 88; 17 Am. Dec., 502; *United States v. Allen,* 14 Fed. Rep., 203; *Emery v. Harrison,* 13 Pa., 317.

As the collector has no general power to sell land at his discretion for the non-payment of an assessment, but a special power only to sell under the particular circumstances mentioned in the act, those circumstances must exist or the power does not arise. It is a naked power, not coupled with an interest, and in all such cases the law requires that every prerequisite to the existence of that power must precede its exercise, and that the officer must pursue the power strictly or his act will not be sustained by it. *Williams v. Peyton,* 17 Wheat., 78. As the burden is on the party who asserts title in himself to furnish the evidence necessary to support it, if the validity of his title depends upon the performance of a precedent act it is his duty to show that the act has been performed, or to establish any other fact which is requisite to the support of his claim. "It forms a part of his title; it is a link in the chain which is essential to its continuity and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title." 17 Wheat., at p. 79. This principle is applicable with all its force and strictness to a sale of land for taxes. The title of the owner of the land will not be divested by anything less than a full compliance with all the material provisions of the law. Failure to comply strictly with those provisions which are merely directory may not affect the validity of the sale, but not so with those that are essential. If this be true, how has the defendant acquired title to the land he claims by virtue of the sale of the collector as against the heirs of the intestate? The first link in his chain of title is missing. He has not shown by any legal proof that an assessment of taxes was made by the Commissioner of Internal Revenue, and this assessment, as we have seen, must be made before the collector can be clothed with any power or authority whatever to take action for the condemnation and sale of the

land. *United States v. Pa. Railroad Co.,* 1 Fed. Rep., 97; *Holden v. Eaton,* 8 Pick. (Mass.), 436. It was a basic fact to be established in the defendant's case, and without it his claim of title has no foundation to rest upon. In addition to this, he has failed to show, even if there had been an assessment, that the collector proceeded regularly and in due conformity with the statute in collecting the tax by seizure and sale of the intestate's property. There was no warrant of distraint, so far as appears, nor was any certificate of purchase delivered to the purchaser at the sale, all of which are made essential requisites by the statute. *United States v. Pa. Railroad Co., supra.*

But the defendant contends that the deed of the collector is *prima facie* evidence that every act which ought to have preceded the execution of the deed had been performed, and that the burden therefore is upon the plaintiff to show that the deed is not good and did not convey the title. If this proposition be true it may be that the recitals in the deed are sufficient in their scope to show that the assessment of the taxes had been duly made and that the necessary steps had been taken to subject the land to their satisfaction, upon the failure of the owner to pay, but we do not think that the deed is *prima facie* evidence of anything except that which is required to be stated in the certificate of purchase, and the facts so required by the statute to be stated are as follows: 1. The name of the person for whose taxes the land was sold. 2. The name of the purchaser at the sale. 3. The real estate purchased. 4. The price paid therefor. And these do not embrace the three facts, or any of them, which we have already said the defendant failed to establish by proof at the trial. The statute, by clear implication, declares that the recitals of the deed shall be *prima facie* evidence only of the facts stated in the certificate, and any recital of a fact not set forth in the certificate is therefore no evidence of that fact. *Hopper*

v. Malleson, supra; Keith v. Preston, 5 Grat. (Va.), 120; *Emery v. Harrison, supra.* It has been expressly so adjudged. *Fox v. Stafford,* 90 N. C., 296; *Brown v. Goodwin,* 75 N. Y., 409.

The questions involved in this case are so carefully considered in *Fox v. Stafford, supra,* that it would seem needless to prolong this discussion of them. A bare reference to that case is sufficient to justify us in holding that the defendant failed to acquire any title under the collector's deed. After a full review of the provisions of the statute and the authorities, the Court, in *Brown v. Goodwin, supra,* upon a substantially similar state of facts as we have in this case, and as appeared in *Fox v. Stafford, supra,* reached the same conclusion as did the Court in the latter case.

Questions were raised as to whether the deed of the collector was properly sealed, though it appears to have been (*Harrell v. Butler,* 92 N. C., 20), and as to whether Collector Harkins, as successor to Collector Rogers, could make the deed to Pergusson, under The Code, sec. 1267, when read and construed in connection with the Revised Statutes of the United States, sec. 3198, requiring the deed of the collector to be executed "in accordance with the laws of the State in which the real property is situate, upon the subject of the sale of such property under execution." *Avery v. Rose, supra;* Devlin on Deeds, secs. 1411, 1412. If our statute does not apply or is not to be followed, there appears to be some conflict in the authorities as to whether the deed should be executed by the officer who made the sale, though his term has expired, or by his successor. Black on Tax Titles, sec. 754; Blackwell on Tax Titles, sec. 390; Murfree on Sheriffs, sec. 1042; Devlin on Deeds, *supra.* But it is not necessary that we should decide these interesting questions, and we leave them open for future consideration if they should arise again,

as we have reached a conclusion which disposes of the appeal upon other matters presented in the case.

There is no error in the charge of the Court to the jury, nor in the rulings during the course of the trial.

No error.

CLARK, C. J., *dissenting.* The sole question at issue is the validity of the deed executed by the collector of United States revenue to the defendant. It is stated in the opinion that "the recitals in the deed are sufficient in their scope to show that the assessment of the taxes had been duly made and that the necessary steps had been taken to subject the land to their satisfaction, upon failure of the owner to pay." These were the only respects as to which defects were alleged, and *Avery v. Rose,* 15 N. C., 549; *Fox v. Stafford,* 90 N. C., 298, and other cases are cited as authority that such facts must be proved *aliunde* the recitals in the deed. Such formerly was the law, but long experience having demonstrated that under such ruling no tax title had ever been sustained in this State, our State, in 1887, ch. 137, made a radical change, "which, under the pressure of the same necessity has been enacted in other States," *King v. Cooper, infra,* and made a tax deed *prima facie* evidence of the matters therein recited (and conclusive evidence as to some matter) and threw the burden to negative such recitals upon the tax delinquent. This act was passed after careful deliberation by the Legislature of 1885, which created a commission to report an act to that effect, and by the Legislature of 1887, which, with some amendments, adopted the report of the commission. That act has been sustained in *Peebles v. Taylor,* 118 N. C., 165; *Sanders v. Earp, Ibid.,* 275; *Moore v. Byrd, Ibid.,* 688; *Powell v. Sikes,* 119 N. C., 231; *Lyman v. Hunter,* 123 N. C., 508; *King v. Cooper,* 128 N. C., 347, and in several other cases.

The United States found it necessary and proper to pass a

similar act, and section 3199, U. S. Rev. Stat., reads as follows: "The deed of sale given in pursuance of the preceding clause shall be *prima facie* evidence of the facts therein stated." This plainly has reference to the recitals in the deed, like all other similar statutes, and not to the recitals in some preceding certificate. As it is held in the opinion herein that such "recitals in the deed are sufficient in their scope to show that the assessment of the taxes had been duly made, and that the necessary steps had been taken to subject the land to their satisfaction upon failure of the owner to pay," and there is no evidence to contradict this, and no allegation of any defect in any other particular, it follows that in the further language of said section 3199, U. S. Rev. Stats., the deed must "operate as a conveyance of all the right, title and interest the party had in and to the real estate thus sold."

The validity of this U. S. statute in thus changing the rule by making the recitals in the deed *prima facie* and placing the burden to show irregularities upon the tax defaulter, has never been called in question. But the United States Supreme Court has repeatedly affirmed the constitutionality of similar State statutes, which decisions and those of the State courts, all to the same effect, may be found collected in 2 Cooley Taxation (3 Ed.), 1007, note 3, and 1008 and 1009, and very numerous cases in the notes thereto. The effect of these statutes is thus summed up (p. 1007):

"If the tax deed is made *prima facie* evidence of the regularity of all proceedings and of title in the purchaser, this effects an entire change in the burden of proof, releasing the purchaser thereof, and casting it upon the party who would contest the sale. The purchaser is no longer under the necessity of showing the correctness of the proceedings, but the contestant must point out in what particular he claims them to be incorrect."

The power to enact, and this effect of, the statute (U. S.

Rev. Stats., 3199), is sustained by three pages of citations, among them many from the United States Supreme Court, each of which supports the validity of this plaintiff's deed. With the great increase in the subjects under government requiring expenditures and the greater increase everywhere in the rate of taxation, such acts become imperatively necessary. The evasion of any property from payment of its due share of taxation increases the rate levied upon those who pay. Collection can only be enforced by sale, or the fear thereof. There can be no sales without purchasers, and no purchasers unless they can get good titles. Those who pay their taxes honestly should be protected by the government from also being assessed to pay the taxes of those who default. Under the old system this was well nigh impossible, for (as already stated) no tax title was ever sustained by the Supreme Court of this State till since the passage of the act of 1887, above cited. The Federal statute (sec. 3199) is of the same tenor as our act of 1887, and was enacted for the same reason. We should give it the same construction and enforcement we have given our own statute.

PENN LUMBER COMPANY v. MCPHERSON.

(Filed November 3, 1903.)

1. COUNTER-CLAIM — *Contracts — Pleadings — Foreclosure of Mortgages.*

   In an action on a note to recover the possession of mortgaged property the defendant may set up a counter-claim arising from a breach of a contract.

2. REFERENCES—*Pleadings—Demurrer—The Code, sec. 421.*

   A reference should not be ordered, after overruling a demurrer, until the pleadings are in and the parties are at issue.

ACTION by the Penn Lumber Company against D. J. McPherson, heard by Judge *O. H. Allen* at May Term, 1903,

of the Superior Court of MOORE County. From a judgment for the defendant the plaintiff appealed.

U. L. Spence and *W. J. Adams,* for the plaintiff.
Seawell, McIver & King and *Murchison & Johnson,* for the defendant.

CONNOR, J. It is alleged in the complaint that the defendant executed his notes, aggregating one thousand dollars, payable to the plaintiff. That on the same day he executed to the plaintiff a mortgage on certain personal property therein described, which mortgage was duly recorded. That, although past due, no part of the notes have been paid. That the defendant wrongfully and unlawfully withholds the possession of said property, although the plaintiff has demanded the same; that at the institution of this action the plaintiff procured from the Clerk a requisition for the immediate possession of said property, etc. The prayer for judgment is that the plaintiff be declared the owner and entitled to the possession of said property and "for such other and further relief as it may be entitled to under this complaint in law and equity."

The defendant answering admitted the material averments in the complaint, and for "further answer," set up two causes of action against the plaintiff by way of counter-claim. He says that he entered into two contracts with the plaintiff, by one of which he was to furnish and the plaintiff was to accept certain timber, and by the other the plaintiff was to deliver and he was to haul to the plaintiff's mill certain logs; that although he has performed so far as he was permitted, and is ready, willing and able to fully perform his part of said contracts, the plaintiff has failed and refused to perform, etc.; that by reason of such failure he has sustained damage.

He further says that while he was sick the plaintiff used

eight mules belonging to him, and by improper treatment injured his mules, whereby he sustained damage.

The plaintiff demurred to both of said counter-claims, for that the cause of action set forth in the complaint is in tort, while the causes of action set forth in the answer by way of counter-claim arise out of contract. His Honor overruled the demurrer as to the first counter-claim, and sustained it as to the second. He further ordered a reference. To the judgment and the order of reference the plaintiff duly and in apt time excepted and appealed. The defendant not having appealed, the ruling of his Honor upon the second counter-claim is not before us.

We construe the complaint, in the light of the facts set forth, without regard to the specific prayer for judgment, as fixing the character of the action in contract. It seeks to recover the amount alleged to be due on the notes set out and possession of the property mortgaged, to the end that it may subject the same to sale for the purpose of paying said judgment. This judgment prayed for is incidental to and in aid of the primary right—the collection of the debt. Thus construed, we can see no reason why the defendant may not set up and have his counter-claim passed upon, to the end that the dealings between the plaintiff and himself may be settled and their rights adjudged in one action. The plaintiff says that the defendant entered into a contract with it and promised to pay one thousand dollars; that he failed to do so. This is a breach of contract. The defendant says this is true, but that the plaintiff entered into a contract with him and failed to perform its obligations in that respect. This is a breach of contract. The plaintiff says this is all true, but that these matters cannot be settled in one action, because one cause of action is in tort and the other in contract. But little progress toward the simplification of the science of pleading and the settlement of counter-claims in one action will have been made by our reformed

procedure if this cannot be done in this case. It is very clear that his Honor was correct in overruling the demurrer. The language of *Smith, C. J.*, in *Cotton v. Willoughby*, 83 N. C., 75; 34 Am. Rep., 564, is very appropriate here. That was an action for the recovery of a crop upon which the plaintiff held a mortgage. The Chief Justice said: "It may not be amiss to observe that if the plaintiffs recover they will hold as trustees, and as all interested in the fund are before the Court, we see no reason why, in the present proceeding, the mortgage may not be foreclosed, the equities involved adjusted and the whole matter finally adjudicated in this action." *Poston v. Rose*, 87 N. C., 79, was an action for the recovery of the possession of a crop upon which the plaintiff claimed a lien. The defendant set up a counter-claim, arising upon an account for boarding the plaintiff's child and for work and labor. The Court said: "It was certainly competent for the defendant to extinguish, by payment or proof of a counter-demand, the indebtedness due from the defendant, since the lien must be commensurate with the debt, and will be extinguished when it is paid. It is not an action merely to recover the possession of the property to which the lien adheres, but to have the indebtedness ascertained and adjudged, and then to enforce its payment, if necessary, by a sale of the property. *Livingston v. Farish*, 89 N. C., 140; *Austin v. Secrest*, 91 N. C., 218; *Woolen Co. v. McKinnon*, 114 N. C., 669.

We concur with his Honor's judgment upon the demurrer, but we are of the opinion that no order of reference should have been made in the condition of the pleadings. The reply of the plaintiff may interpose pleas in bar of the defendant's counter-claim, or it may appear that no reference is necessary. The cases fixing the practice in regard to the time at which a reference should be made are collected in Clark's Code, sec. 421 (1). It is not clear whether the order made by his Honor

directs a compulsory reference. It is important that when a reference is ordered for any of the reasons set forth in section 421 and the several subsections, it should appear clearly and affirmatively that the Court acts upon the authority found in said section, and that the exception to the order should conform to the ruling of this Court in *Driller Co. v. Worth,* 117 N. C., 515. We have at the present term had a striking illustration of the confusion and uncertainty into which the rights of parties litigant are thrown by a failure to observe the provisions of The Code as construed by this Court, *Kerr v. Hicks,* at this term. No order of reference either by consent or otherwise should be permitted by the Court until the pleadings are in and the parties are at issue. It is the purpose of the law of procedure to preserve and protect substantive rights. A failure to observe the law always results in confusion and too often in sacrifice of such rights. These observations are not called forth by any suggestions arising upon this record. The judgment is

Modified and affirmed.

GREENLEAF v. PEOPLE'S BANK OF BUFFALO.

(Filed November 10, 1903.)

1. SERVICE OF PROCESS—*Summons—Process—Parties—The Code, secs. 641, 1367, 1735.*

An officer of a foreign corporation, while in the state attending a judicial sale to which his company is a party, is not exempt from service of summons in an action against the corporation.

2. SERVICE OF SUMMONS—*Summons—Attorney and Client—The Code, secs. 18 and 19.*

A non-resident attorney in the state to represent his clients in a matter pending in the federal court is not privileged from service of summons.

CLARK, C. J., and DOUGLAS, J., concurring.

ACTION by H. T. Greenleaf against the People's Bank of Buffalo and Norris Morey, heard by Judge *M. H. Justice* at Spring Term, 1903, of the Superior Court of DARE County. From a judgment for the defendants the plaintiff appealed.

E. F. Aydlett, George W. Ward and *W. M. Bond,* for the plaintiff.

Pruden & Pruden and *Shepherd & Shepherd*, for the defendants.

MONTGOMERY, J. Upon the motion to strike out the returns of the sheriff of service of process (summons) upon the defendants, The People's Bank of Buffalo and Norris Morey, the following are substantially the facts as found by his Honor: In February, 1898, an action was begun in the United States Circuit Court for the Eastern District of North Carolina, in which the East Coast Cedar Company was plaintiff and The People's Bank of Buffalo, N. Y., American Exchange Bank of Buffalo, N. Y., William A.

Ensign and Charles A. Ensign and Henry H. Persons and John R. Hazel, receivers, were defendants. The defendant Morey was one of counsel for the defendants, and A. D. Bissell was vice-president of The People's Bank. Under a decree for the sale of the real estate described in the pleadings the sale took place at Manteo, N. C., on the 12th of November, 1902. Service of the summons in the case before us was made personally upon Bissell by the sheriff of Dare County at the sale, Bissell being present at the sale and in the State, by the advice of counsel, and for no other purpose than to attend the sale. The summons was served upon the defendant Morey in an action for debt in Wake County, N. C., on the 2d of January, 1903, at his hotel, while he was in attendance upon the United States Circuit Court for the purpose of representing his clients as their attorney in the matter of a notice made in the cause for the confirmation of a sale made by certain commissioners, and for the entry of a decree confirming the sale and directing title to be made to the purchasers in accordance with the practice of the United States Courts. Both Bissell and Morey were at the times of the service of summons residents of New York State and had been for many years just preceding the service of the summons; Bissell having been in North Carolina at that time solely for the purpose of representing The People's Bank at the sale, and the defendant Morey solely for the purpose of attending the court as attorney for his clients in the case, and especially to attend to the matters embraced in the motion.

Upon motion of counsel in the Court below, who made special appearances, his Honor struck out the returns of the sheriffs of service of process (summons) upon Bissell and Morey, and it was adjudged by the Court that the service be vacated and set aside.

As to the service made upon the defendant, The People's Bank, the question resolves itself into this form: Is service

of a summons an invalid service if made upon a managing officer of a non-resident corporation who is in this State for the sole purpose of attending a sale of land in which his corporation is interested, and the sale being made under a judicial decree of the Circuit Court of the United States in an action in which the foreign corporation was a party? The answer to the question depends upon whether or not the sale was such a matter as amounted to a judicial proceeding and rendered Bissell's presence equivalent to a constructive presence in the Court. If so, his Honor was correct in his judgment vacating the service of the summons on The People's Bank, for, in *Cooper v. Wyman,* 122 N. C., 784, 65 Am. St. Rep., 731, this Court held that parties and witnesses who were non-residents were exempted from the service of summons and other civil process from the time of their coming into this State, during their stay and a reasonable time for returning, and when they are here for no other purpose whatever. But we are of the opinion that the sale of the land, although made under a judicial decree, was not such a judicial proceeding as would exempt a party interested from service of civil process. Bissell was not before the Court constructively; he was not attending the taking of depositions under order of the Court, nor was he doing anything which could alter the decree of sale or affect in any manner the action of the commissioner who had been ordered to make the sale. That officer was directed by the Court to do all that was to be done on the day of sale; that is, to make the sale and report the result back to the Court. At that time the defendants would then have their day to make exceptions to the report, or to take any action concerning it which they might deem proper. We therefore think his Honor was in error in setting aside and vacating the return of the sheriff of Dare of the service of the summons upon The People's Bank of Buffalo.

As to the service of the summons upon Morey, the attorney at law: The common rule on the question of service of process in civil actions upon attorneys is stated in 2 Taylor on Evidence, sec. 1330, in these words: "In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of judicial proceeding, but, in common with parties, barristers, solicitors and, in short, all persons who have that relation to a suit which calls for their attendance, they are protected from arrest upon any civil process while going to the place of trial, while attending there for the purposes of the cause and while returning home." In 3 Blackstone's Commentaries, star page 289, the rule is laid down thus: "Also clerks, attorneys and all other persons attending the courts of justice (for attorneys, being officers of the courts, are always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by *bill* (called usually a bill of privilege), as being presumably present in court." We have no statute law in this State affording exemption to attorneys from the service of court process upon them, and, as we have seen, there was nothing at common law which exempted an attorney from being served with process in the nature of our summons. The service of the summons upon Morey was therefore regular and should not have been vacated and set aside by his Honor.

The question does not arise in this case as to whether the common law exemption, to its full extent, of an attorney from *arrest* in a civil action prevails in this State, but we think an expression of opinion on the matter might not be out of place. The provision of The Code embraced in section 641 provides that "all such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of or repugnant to or incon-

sistent with the freedom and independence of this State and the form of government therein established and which has not been otherwise provided for, in whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within this State." The matter of exemption from service of process in civil actions, as it prevailed at common law, has been the subject of revision by our statutory law, as will appear by reference to sections 1367 and 1735 of The Code. Section 1367 provides that witnesses shall be exempt from arrest in civil cases during their attendance at any court, and during the time such witnesses are going to and returning from the place of attendance; and section 1735 prohibits the sheriff or other officer from arresting under civil process any juror during his attendance on or going to and returning from any court of record. As we have said, we have no legislation on the subject of the exemption of attorneys from the service of process, but we think, under our institutions and because of obsoleteness by non-usage, the privilege ought not to be afforded to attorneys except when they are actually in attendance upon court in the due course of their employment as attorney.

In a very few States of the Union the courts have held that attorneys at law, while in attendance upon court, are exempted from the service of summons or other process not in arrest, but the reasoning upon which those decisions are based is not satisfactory to us. It must be borne in mind that the privilege of exemption from *arrest* afforded to attorneys while attending court is not so much for the benefit of the lawyers as it is for their client, and for the aid they give to the court as officers thereof in the due administration of justice.

There was error in the vacation and setting aside of the sheriff's return of the service of the summons upon Morey, the attorney.

Error.

CLARK, C. J., concurring. The defendant Morey was served with summons in this case while at a hotel in this State. He contends that because he was a lawyer, resident in another State, and was attending court in this State as counsel in a cause therein pending, the service should be struck out. The proposition is a novel one in a land where equality before the law is the ruling principle and where special privilege to any class of our citizens is not only not recognized by law but is prohibited by the Constitution. A careful examination shows no ground for the alleged exemption of lawyers from service of summons. There is no precedent in England to sustain the proposition, and none in this country save a single case, a very recent one—*Hoffman v. Circuit Judge*, 113 Mich., 109; 38 L. R. A., 663; 67 Am. St. Rep., 458—which holds that a lawyer, resident in the same State, is privileged from service of a summons while attending the Supreme Court of the State or going or returning therefrom, but none of the authorities cited in that opinion sustain its conclusion. The reason given in the opinion is that while by statute in that State the prohibition of the arrest of counsel in a civil suit is restricted to the actual sitting of a court at which he is engaged, that this does not repeal the common-law exemption of counsel from service of summons. But, on the other hand, the most eminent lawyer which that State (Michigan) has produced, *Judge Cooley*, in a note to his work on Constitutional Limitations (5th Ed.), p. 161, says: "Exemption from arrest is not violated by the service of citation or declaration in civil cases." Besides, there was at common law no exemption of lawyers from service of process other than *arrest*, and the reason for the latter was that it would be an injury to clients whose cause had been prepared for trial by such counsel to suddenly deprive them of his services, but service of a summons does not have that effect.

In *Robbins v. Lincoln*, 27 Fed. Rep., 342 (United States Circuit Court for Illinois), it is well said: "Inasmuch as resident attorneys may be served with summons while in attendance upon court, an attorney from another State has no greater privilege." This is exactly in point here. It is well known that no lawyer in this State has ever in its history been privileged, or contended even that he was privileged, from service of summons while attending court. If he were, as the Constitution, Art. IV, sec. 22, now provides that "the courts are always open," no lawyer or judge could ever be served with summons. In England, Blackstone says (3 Bl. Com., 289) that lawyers could not be *arrested* on civil process while in attendance upon court, but could be served with a bill, without arrest, which was equivalent to service of a summons. The same is stated in 8 Bacon's Abr. "Privilege" B, with the modification that if an attorney is sued with another (as in this case) "he is not privileged from arrest, even though it is during his attendance in court," the evident reason being to prevent class discrimination. The exemption of lawyers from arrest, it seems, has now been repealed in England. In this State the English privilege of exemption of lawyers from *arrest* has never been recognized. It is well known that one of the most distinguished lawyers and judges of this State, whose portrait now hangs on the walls of this chamber, was arrested and imprisoned for debt, and long prevented from attending upon court. This barbarous proceeding of imprisonment for debt, handed down from the common law, should have been repealed long before it was, but while it was in force our predecessors applied it impartially, and the bench did not hold their own members or their profession exempt. There was not at common law, and has not been in this State, any exemption of any one from service of summons, and the exemption from arrest under our statute is conferred only upon witnesses and jurors. The Code, secs.

1367 and 1735. And even witnesses and jurors are not exempted from service of summons, since such service would not deprive the court of their presence. There is no reason why lawyers should be privileged from either arrest or service of summons any more than other officers of the court, as sheriffs, clerks, criers and the like, and the legislative power has therefore seen fit to make the exemption apply only to witnesses and jurors, and, as to them, to make the exemption extend to freedom from arrest only.

As to non-residents, in *Cooper v. Wyman,* 122 N. C., 784, this Court held that non-resident witnesses and suitors coming into this State solely for the purpose of litigation were exempt from service while here for that purpose only. This was put upon the ground of necessity, because the State could not *compel* their presence, and that since no one else could fill their functions it was in the interest of justice to give them "a safe conduct." But this reasoning has not obtained in some States, notably Illinois, which holds that neither are exempt from service of summons. *Greer v. Young,* 120 Ill., 184, citing authorities. In *Nichols v. Goodheart,* 5 Ill. App., 574, it was held that a defendant involuntarily in the State, by virtue of criminal process, is not exempt from service of summons, citing *Williams v. Bacon,* 10 Wend. (N. Y.), 636. Other States hold that the rule is restricted to witnesses only. *Shearman v. Gunlatch,* 37 Minn., 118. Other States extend the exemption to parties also, since they have become competent as witnesses (*Mitchell v. Huron,* 53 Mich., 541), and our State has adopted that rule, but restricts the exemption to those two—"non-resident witnesses and parties." An exhaustive brief of all the authorities, showing that the privilege extends only to non-resident witnesses and parties, will be found in the notes (eighteen pages) to *Mullen v. Sanborn,* 25 L. R. A., 721-738. No court whatever has in any case extended the exemption to non-resident lawyers. The nearest

approach to it is *Trust Co. v. Railroad*, 74 Fed. Rep., 442, in which a subpœna served upon non-resident counsel, which prevented his returning home and attending to business he had left unprovided for, was set aside. That case is not sustained by any previous authority, and evidently rests more upon the ground stated therein, that the non-resident subpœnaed was president of a railway company, than because he was also a lawyer, but, if sound, it is very far from sustaining an alleged exemption from service of summons, which did not prevent Morey from returning home and adjusting his business, for the trial of his case is for a subsequent term.

The United States Constitution, Art. I, sec. 6, prohibits the arrest of a member of the House of Representatives or a Senator during the session, except for treason, felony and breach of the peace. There is a similar provision as to the members of the Legislature in Nebraska. The numerous and uniform authorities that such privilege from *arrest* does not exempt from service of process without arrest are collected in a very recent and able opinion (1903) in *Berlet v. Weary*, 93 N. W., 238 (Neb.); 60 L. R. A., 609; and in *Rhodes v. Walsh*, 55 Minn., 542; 23 L. R. A., 632; *Gentry v. Griffith*, 27 Tex., 461. For a stronger reason this is so where, as in most States as well as in this, lawyers are not exempt even from arrest. In *Lyall v. Goodwin*, 4 McLean, 29, a service of a summons from a United States Court upon a judge of the State Supreme Court, in his own court and while actually on duty, was set aside because being a supposed indignity to the court and interference with its business. Even if this can be sustained and extended to counsel, neither the dignity of the court nor the despatch of business in this case could be interfered with by the service of summons upon Morey at the hotel.

Nor, in the nature of things, is there any reason why a non-resident lawyer, coming here for a consideration in the

pursuit of his profession, should be exempt from the service of summons any more than a non-resident physician or minister or a member of any other calling. The plaintiff sues for services rendered to the defendants in this State at their request. If Morey is exempt from service because here in the exercise of his profession, a "commercial tourist" is by the same right exempt from being served with summons in an action for a hotel bill incurred while prosecuting *his* calling. Indeed, his ground for exemption would be more plausible, for he is engaged in interstate commerce and the lawyer is not. Service of summons upon neither will interfere with the dignity of the courts or their despatch of business. Our State extends no preference to non-resident lawyers over those living here. The Code, secs. 18 and 19; *Manning v. Railroad,* 122 N. C., p. 828.

As far back as 1769 (10 George III, ch. 50) England passed a statute confirming the ruling of *Sir Orlando Bridgeman* in *Benyon v. Evelyn Tr.*, 14 Car., 2 C. B. Roll, over a century before (1661), and cited in Knowles' case, 12 Mod., at p. 64 (1694), that the privilege which members of Parliament enjoyed of being exempt from arrest did not exempt them from being sued or from service of ordinary process without arrest. The privilege was deemed too invidious a class privilege even for that age and country, and the claim was denied by Parliament itself and the contention put at rest. *Cassidey v. Stewart*, 2 Man. & G., 437. It is not for an American court to reverse the process and hold that because lawyers were formerly privileged from arrest during attendance upon court, therefore they are exempt from being sued and being served with a summons. By the census of 1900 there were 114,703 practicing lawyers in the United States, of whom 1,263 were in North Carolina. If, during all these years, lawyers had possessed the privilege of exemption from the service of summons, assuredly more than one case could be

found to assert it. If it had been so asserted it would have been promptly repealed by statute, seeing that the Parliament in England passed an act denying a similar claim that its own members were exempt from service of summons because privileged from arrest, and that members and Senators in Congress are not privileged from service of summons, though expressly exempted from arrest on civil process by the Constitution. Even the former privilege of lawyers from arrest has been modified in some States and expressly repealed in others, and in others still, as in North Carolina, it has never been recognized or acknowledged.

Equally unfounded is the claim that service upon the other defendant, the officer of a corporation (*Jester v. Steam Packet Co.*, 131 N. C., 54), was invalid because made when he was attending a sale of land under a decree of court. Such sale may, like other acts, come before a court for review, but the sale itself is not a judicial proceeding, and no exemption from service of process extends to it. Such exemptions are restricted to non-resident witnesses and parties, and are permitted, not on their own account or for their own benefit, but for the benefit of the court in obtaining *evidence at a trial*, when the court cannot *compel* the presence of those who can testify to facts in issue in the litigation. This can have no application to the attendance of a party at a sale, under a decree in the cause, for his own convenience or benefit.

In the days of Privilege, under the rule of Ecclesiastics in England, they held their own profession exempt from the jurisdiction of the civil courts, and set apart certain places where all men were exempt from service of process under the "Privilege of Sanctuary." The last remnant of such class privileges was repealed. 21 James I. Judges have never claimed for the legal profession or the courts any similar exemption, either as to persons or places. With lawyers for judges, justice knows neither class nor caste, and admits no

special privileges, and for its administration "every place is a temple and all seasons summer."

The judgment setting aside the service of summons must be Reversed.

DOUGLAS, J., concurs in the above concurring opinion.

CLEGG v. SOUTHERN RAILWAY COMPANY.

(Filed November 10, 1903.)

1. NEGLIGENCE—*Railroads—Personal Injuries—Presumptions.*

There is no presumption of negligence against a railroad company upon simple proof of injuries or death caused by its trains.

2. APPEAL—*Evidence—Pleadings—Exceptions and Objections.*

Where the record does not show what part of a paragraph of the pleadings was offered in evidence, an exception thereto is too indefinite and will not be considered on appeal.

DOUGLAS, J., dissenting.

ON PETITION FOR REHEARING. For former opinion see 132 N. C., 292.

Armfield & Turner, J. F. Gamble and *W. G. Lewis*, for the petitioner.

L. C. Caldwell, in opposition.

MONTGOMERY, J. This case is before us again on a petition to have it reheard. The action was commenced to recover damages against the defendant for the alleged negligent killing by the defendant of the plaintiff's intestate. The evidence tended to show that a short time before the passing of one

of the defendant's trains, after dark, the intestate, not drunk but under the influence of strong drink, was seen going in the direction of the railroad track, and was a short time afterwards found dead, lying by the side of the track and parallel with it and where a dirt road ran along by the side of the railroad track, but not at a crossing; that a part of the top or back of the intestate's head was knocked off, which was the only wound seen on the body; that the track was straight at the point where he was killed for a half mile or more, and that there was no eye-witness to the death; and that the intestate had not been dragged or run over by the engine. There was evidence on the part of the defendant that there was no sign of blood on the cross-ties, and one of the plaintiff's witnesses said that on the next morning after the killing there was some blood on the cross-ties, but he could not tell whether it was between the rails or on the outside.

If it might be inferred from the evidence that the intestate was killed by the defendant's train, yet "there is no presumption in this State of negligence against railroad companies upon simple proof of injuries or death caused by their trains." *Upton v. Railroad*, 128 N. C., 173. If the intestate was upon the defendant's track, either walking or sitting or lying down, when he was killed, he was guilty of contributory negligence. If the intestate had been walking along the track, or had been sitting in a natural way, the engineer could presume he would get off before the train struck him. If he had been helpless, lying down on the track or sitting upon it in a manner which showed he was unconscious or helpless, the engineer would have been at fault in running him down, notwithstanding the intestate's previous contributory negligence, if the track was straight for half a mile, for the engineer could have seen him by a proper lookout. But there was no evidence tending to show that he was on the track in a helpless condition. In Up-

ton's case, *supra,* the Court said: "The intestate having been negligent, before a recovery can be had against the defendant on the ground of its negligence in not availing itself of 'the last clear chance,' it must be shown by the plaintiff, by proper evidence, not simply that the intestate was on the track in the way of the engine, but that he was there apparently asleep or in other helpless condition, and that the engineer had discovered his condition, or by keeping a reasonable watchout could have discovered it in time to have prevented the injury, and that after he had discovered it or could by proper watchfulness have had reasonable grounds to believe that such was the condition of the intestate, he failed to use all available means to prevent the injury."

The counsel of the plaintiff in his argument here on the petition to rehear insisted that this Court in its former opinion (132 N. C., 292), must have overlooked the fact that the plaintiff on the trial below introduced "a part of the first paragraph of the further defense in the defendant's answer." If that was so, we find upon examination of that part of the plaintiff's evidence that it can be of no service to the plaintiff. The whole of that paragraph of the defendant's answer is as follows: "That the intestate of the plaintiff contributed to his own death by his recklessness and negligence in being drunk and going upon the track of the defendant in the night time, and lying or sitting down upon defendant's track at a point where he could be seen by the defendant's employees in time to avoid the injury complained of." The record shows that the plaintiff did not offer the whole of that paragraph in evidence, but only a part of it. The language as we find it in the case on appeal is: "Plaintiff also offered part of the first paragraph of the defendant's defense." We cannot select what part was intended to be offered. The evidence is too vague for us to consider it. We have examined the

record in this case again most carefully, and we think that plaintiff is not entitled to recover.

Petition dismissed.

DOUGLAS, J., dissents.

BLALOCK v. CLARK.

(Filed November 10, 1903.)

1. TIME—*Options—Contracts.*

An option given February 7th, provided no better offer was received that day by mail, to close "by 8 February," includes the latter day.

2. SALES—*Contracts—Tender.*

A refusal to deliver an article sold, because the price had gone up, makes it unnecessary to tender the price.

3. CONTRACTS—*Options—Tender—Question for Jury.*

Whether a delay of a week was unreasonable, claimed to be due to wet weather, after the acceptance of an option to sell cotton, to go for it and tender payment, is a question for the jury.

4. PLEADINGS—*Sales—Options—Waiver—The Code, secs. 242, 273—Amendments.*

The failure of a complaint in an action for non-delivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action, which may be cured by amendment.

5. APPEAL—*Damages—Measure of Damages.*

The question of the measure of damages does not arise on appeal from the sustaining of a demurrer to the evidence for failure to show a cause of action.

BLALOCK *v.* CLARK.

ACTION by M. B. Blalock and Company against W. D. Clark and others, heard by Judge *W. R. Allen* at July Term, 1903, of the Superior Court of STANLY County. From a judgment for the defendants the plaintiffs appealed.

R. L. Smith, for the plaintiffs.

J. A. Spence, Montgomery & Crowell and *Shepherd & Shepherd,* for the defendants.

CLARK, C. J. This is an action to recover damages for non-delivery of 200 bales of cotton. A witness, one of the plaintiffs, went to see the defendants 7th February. They had 200 bales for sale, which the witness sampled and asked an option upon them, to see if he could place them. The defendants on that day gave him this option, dated 7th February and signed by them: "We offer you 160 to 200 bales of cotton, grades as you have seen, at eight cents per pound, F. O. B., provided we do not receive better price by mail to-day. This offer closes by 8th February." Later, on that day (7th February), the plaintiffs wired the defendants: "Wire me at Mount Gilead, at once, if my offer is bettered." The next day, 8th February, the witness wired the defendants: "Have written once, wired twice, no reply; we claim cotton on your offer. Shipping instructions will follow." He testified further that on 9th or 10th February, he went to Troy, where the defendants resided, twenty miles through the country to weigh up, pay for and ship, but did not do so because of rain, cotton not under shelter and wet. As soon as it was dry and the rain and the condition of the river would permit him to get there, he says he went back, on 15th February, and told the defendants he had come "to weigh, *pay for* and ship cotton"; whereupon they told him they would not let him have it, that cotton had gone up to eight and a half cents and they could not afford to let him have it at eight cents. The

witness further says he demanded the cotton and the defendants refused; that he was able and ready to pay; that he did not tender the cash; that he did not have enough cash in hand, but had money in bank and credit in bank, and "could have paid cash that day." That he had resold part of the cotton to others at an advance, and that it was a cash transaction.

Upon this evidence it was error to non-suit the plaintiff. The option to "close by 8th February," included February 8th, till midnight. "By 8th February" means "not later than February 8th." *Cotton Mills v. Dunston,* 121 N. C., 16, and cases there cited. Besides, by the terms of this option it could operate only on 8th February, for it was given on 7th February, and the defendants reserved the right to accept a higher bid if they received it by mail on that day.

The peremptory refusal of the defendants to deliver the cotton "because the price had gone up" made it unnecessary to make any tender of the actual cash, for on this motion the witness' testimony must be taken as true, that he offered to pay and was ready and able to pay. *Smith v. B. & L. Asso.,* 119 N. C., 260, and cases there cited; *Grandy v. Small,* 50 N. C., 50. Whether there was unreasonable delay in going for the cotton is a matter for the jury, under instructions from the Court, and upon which the defendants may wish to offer evidence. The acceptance of the offer was, on 8th February, in time. The execution of the contract, the payment and delivery must be in a reasonable time.

The failure to aver in the complaint that the plaintiffs were "ready and able to pay" is a defective statement of a good cause of action, since this would have been cured by amendment if a demurrer on that ground had been filed, and indeed, it is "aided" by the answer, which relies upon a release by unreasonable delay and failure of tender. Clark's Code (3 Ed.), sec. 242, and cases cited. Such defect could be cured by amendment of pleadings to conform to the proof,

even after verdict. The Code, sec. 273. The object of The Code system is to try cases upon their merit.

The question of the measure of damages is not one which arises upon an appeal from sustaining a demurrer to the evidence for failure to show a cause of action.

Error.

THOMASON v. JULIAN.

(Filed November 10, 1903.)

WILLS—*Descent and Distribution—The Code, sec. 2145—Testaments.*

A will expressly excluding the children of the testator born after the execution thereof makes a provision for them under The Code, sec. 2145, and such children do not share in the estate as though the testator had died intestate.

ACTION by Kate I. Thomason and others against D. R. Julian and others, heard by Judge *T. A. McNeill* at May Term, 1903, of the Superior Court of ROWAN County. From a judgment for the plaintiffs the defendants appealed.

L. H. Clement and *Hayden Clement,* for the plaintiffs.
Overman & Gregory, for the defendants.

CLARK, C. J. W. T. Thomason in the third article of his will devised to his children, Willie, Katie, Annie and Mary (these plaintiffs), as follows: "In fee-simple all the real estate of which I may die seized and possessed, to them and their heirs forever, subject only to the dower interest of my wife, as mentioned in article 2 of this will, and *to the exclusion of any children now living or hereafter to be born of my present marriage.*" In article 6 of said will he further shows his intention to exclude the defendants, the children of the

second marriage, as follows: "All the rest and residue of my estate I give and bequeath unto my said children, Willie, Katie, Mary and Annie (children born of my former marriage), in equal proportions and *to the exclusion of any children now living or hereafter to be born of my present marriage.*"

The five wards of the defendant are children of the second marriage, all of whom were born after the execution of the will, and one after testator's death, and there was one other child of the second marriage who was born before the execution of the will. The will, which made no provision whatever for the children of the second marriage, was not discovered until several years after testator's death, and this action is brought to recover of the guardian of the children of the second marriage the proceeds of realty which had been sold for partition in an *ex parte* proceeding by all the heirs at law. The defendant relies upon The Code, section 2145—"children born after the making of the parent's will and whose parent shall die without making any provision for them shall be entitled to such share and proportion of said parent's estate as if he or she had died intestate, and the rights of such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter."

The defendant contends that this invalidates the exclusion of his wards, and such is the literal wording, but the true meaning of the section has been held in *Mearcs v. Mearcs,* 26 N. C., 192, and *King v. Davis,* 91 N. C., at p. 147 (and we think correctly), to be that "without making any provision," is not intended to be construed to mean that there must be a gift of certain property or thing for the children, for that would be to merely adopt the popular misconception of "cutting one off with a shilling," but that "without making any provision" means any arrangement or circumstances tending

to show that the testator had these children in mind when the will was made and without any indication that it was his purpose to disinherit them. That purpose does fully and unmistakably appear in this will.

The Legislature is sovereign over the disposition of the property of one deceased, and can restrict, permit or refuse the power of disposition by will, and the statutes of wills, of distributions and of descents can be changed, like any other, at the pleasure of the law-making power. Till the Statute of Wills, 32 and 34 Henry VIII., disposition of lands by will was not allowed in England, and the power to dispose of personalty was restricted. By the Code Napoleon (sec. 913, *et seq.*), which largely prevails on the continent of Europe, a testator can dispose by will of no more than a child's part of either his realty or personalty when there are children, and can only dispose by will of a small share, specified in the statute, when there are no children. A very interesting discussion of the origin of disposition of property by will is to be found, 2 Bl. Com., 488-492; 4 Kent Com., 501-504; 1 Underhill Wills, 1; 1 Redf. Wills Ch., 1; Cooper's Justinian, note p. 485. Under our present statute a testator is inhibited from any disposition whose effect would be to infringe upon the widow's right of dower, and this restriction could unquestionably be either extended or restricted, as to her or applied to children's share or others. But this statute, The Code, sec. 2145, was not intended to extend such restriction in favor of unborn children. If such had been the purpose it would have specified, as in the case of the widow, what sum would be a sufficient provision. Without that a nominal sum—a cent or a penny—would be sufficient, and we think the true construction is that the statute does not secure any provision, but intends that when the testator has failed to provide for children born after the execution of the will the presumption is that the failure to provide for them is unintentional,

and they will be given a child's share, but that the statute is not intended, like the statute above cited, to secure such unborn children a share of the father's estate, when (as here) it is clear that he intended to disinherit them. The Legislature could so enact, but we do not think such is a just construction of The Code, section 2145.

No error.

TROLINGER v. BOROUGHS.

(Filed November 10, 1903.)

1. MARRIAGE — *Register of Deeds—Licenses—Negligence—Penalty—The Code, sec. 1816.*

The evidence in this case is not sufficient to show reasonable inquiry by a register of deeds as to the legal age of a woman to marry.

2. REGISTER OF DEEDS—*Marriage—Licenses—Questions for Court.*

In an action against a register of deeds for issuing license for the marriage of a girl under eighteen, the facts being found by the jury or undisputed, it is for the trial court to say whether they show reasonable inquiry.

ACTION by D. M. Trolinger against J. P. Boroughs, heard by Judge *W. R. Allen* and a jury, at July Term, 1903, of the Superior Court of RANDOLPH County. From a judgment for the defendant the plaintiff appealed.

Jas. T. Morehead and *G. S. Bradshaw,* for the plaintiff.

Hammer & Spence and *Brittain & Gregson,* for the defendant.

CONNOR, J. This action is prosecuted for the recovery of the penalty imposed by section 1816 of The Code, upon any

Register of Deeds "who shall knowingly and without reasonable inquiry issue a license for the marriage of any two persons, to which there is any lawful impediment, or whether either of the persons is under the age of eighteen years, without the consent, etc." The plaintiff testified that his daughter, for whose marriage the license complained of was issued, was at that time only a few months over thirteen years of age; that he did not give his consent thereto, did not see her married and knew nothing of it; that he lived in Greensboro in 1901. The defendant testified as a witness for and in behalf of the plaintiff; that he issued the license; that he was elected register in 1900; that Level Cross and New Salem are in the northern part of the county, fourteen miles from Asheboro, and he lived in the southern part of the county before his election, fourteen miles from Asheboro, and the county is thirty miles square; that one J. E. Phillips applied to him for the license on August 19, 1901, at 4 o'clock P. M.; he introduced himself as Phillips. The witness said to him that he did not exactly recognize him, and asked if he was related to D. M. Phillips, a man known to the witness. He said he did not know him, but supposed he was related to him, as his people came from the eastern part of the county and were related to all of that name in the county. The witness asked him to give him the names of several parties whom he knew at Level Cross, that he might ascertain if he was a citizen of the county, and he thereupon named several persons known to the witness. The witness asked him for whom he wanted the license, and he named Barney Garner and Addie Trolinger. He said they lived at Level Cross, that the girl's age was twenty and the man's twenty-three or twenty-four. He said he lived at Level Cross, and was working on a farm, and that the parents of the parties for whom he wanted the license lived at Level Cross. The witness told him that he must make affidavit. He

said that he was perfectly willing to do so, as he knew the parties and their ages. The witness warned him of the solemnity of an oath and the responsibility attached to it, if false. He made the affidavit attached to the license. He said that he worked on the river a part of the time. He was intelligent and neat in appearance; his manner and deportment intelligent and gentlemanly. There were no means in the register's office of finding the ages of persons. The witness went to the door of his office to see if the sheriff, Clerk or any other person was in their offices, as it was his habit to do when he did not know the party, to make inquiry of them. The doors were shut and he could not find any one. There were no stores near his office. None of the lawyers were in their offices. Phillips fully satisfied the witness that he was justified in issuing the license. Phillips appeared to be between twenty-one and twenty-four years of age. The witness did not know there was a Trolinger family in the county; had the tax books in his office; several hundred families were moving up and down the river to the cotton mills in that section; several hundred who did not list any taxables. There are 5,000 or 6,000 voters in the county. The witness was at work on the tax books at the time. No one came with Phillips, who said that he came in the man's place because he thought a second party necessary. The witness relied upon his statement; wanted to see the sheriff and Clerk because of their knowledge of the people. His Honor at the conclusion of the testimony instructed the jury if they believed the evidence to answer the issue in the negative. The plaintiff excepted, and from a judgment for the defendant appealed.

It was stated upon the argument that his Honor's ruling was made in deference to the decision rendered by this Court in *Harcum v. Marsh,* 130 N. C., 154. In that case the applicant for the license was one Davidson, the father of the man to be married. He stated that the parents of the girl resided

in Virginia, and she was nineteen years of age; that he had personal acquaintance with her and knew her age; that her parents had recently moved from Mauney's Neck, and she had returned because she wished to be married among her friends. The defendant then swore him in the presence of a witness. "Davidson's appearance was that of a common farmer." He was an entire stranger to the defendant, and the defendant made no inquiries about the parties except from Davidson, who said he lived in Virginia.

It may not be easy to reconcile the opinion of the Court, that the defendant in that case was not liable, with several cases in our Reports defining the term "reasonable inquiry." The circumstances attending each case necessarily vary, and each must to a very considerable extent be decided upon such circumstances. It is well settled that the facts being admitted or found by the jury, the question as to what is "reasonable inquiry" is one of law for the Court. *Joiner v. Roberts,* 114 N. C., 389. The evil intended to be remedied by the statute is improper, hasty and injudicious marriages by girls under the age of eighteen years without the written consent of their parents, or, as amended by the act of 1895, ch. 387, guardians or other persons standing *in loco parentis.* We adopt, with full approval, the remarks of *Mr. Justice Montgomery* in *Agent v. Willis,* 124 N. C., 29: "To all persons who believe that the welfare of human society depends largely upon the family relation, and that the contract of marriage should be defended by careful and just laws for the purpose of guarding against legal impediments and to prevent the marriage of those under a certain age, when the parties are presumed not to be able to contract, the duty of the Register of Deeds, the officer in our State charged with the duty of issuing marriage licenses, seems most important and most solemn. That officer must exercise his duties carefully and conscientiously, and not as a mere matter of form." It was also

said in *Williams v. Hodges,* 101 N. C., 300, that "the license should not be issued as of course to any person who shall apply for it; the register is charged to be cautious and to scrutinize the application." This and other language of like tenor used by this Court illustrates the principle by which it has been guided in effectuating the wise policy upon which our marriage laws are founded. The alarming and demoralizing frequency of divorces among us demands that the Court shall give effect to such legislation as we have to prevent hasty, ill-considered marriages, without the consent of their parents, by young women who have not reached years of discretion.

We are of the opinion that the defendant did not, upon his own testimony, make the "reasonable inquiry" before issuing the license, which the law requires of him. The applicant was a stranger to him. He professed to live in the county and to be related to all of the name of Phillips in the county, and yet he did not know the first and only one of the name called to his attention. He came alone to the county town, and gave no reference to any person residing therein. It is true that he named several persons known to the defendant in Level Cross township. The defendant evidently was doubtful as to his duty. He went to see if the sheriff and Clerk were in their offices to make inquiry. Although he did not know of any family by the name of Trolinger in the county, he fails to examine the tax books upon which he was then at work. It is true that he would not have found the name of the girl, but he would have found the name of her father, who Phillips said lived at Level Cross, or, failing to find it, he would have discovered that the applicant was not telling the truth, or at least would have had reasonable ground to doubt his word. We cannot think that a prudent business man, under the circumstances, would have relied or acted upon the statement of Phillips, a stranger without identification, in an important matter of business. He would not have en-

trusted him with an important paper for delivery or an amount of money to be paid to some person at Level Cross.

In the case of *Cole v. Laws,* 104 N. C., 651, the applicant was known to the deputy issuing the license, "but not his character or reliableness." *Smith, C. J.,* says: "He represents a girl of fourteen to be twenty-two. Nor is it shown that anything was said about her parentage and their assent to her projected marriage. In a matter involving such grave consequences and fixing her future life, did the deputy make any reasonable effort to inform himself of the fact, and act with a prudent regard to a parent's rights?"

Merrimon, J., in *Williams v. Hodges, supra,* says: "To issue a license to marry 'without reasonable inquiry,' without care and scrutiny, and when it does not appear probable to the register that it may and ought to issue, as the law contemplates, is a perversion of the statute, disappoints its just purpose, and oftentimes brings distress and ruin upon individuals and families. To prevent such evils the statute provides heavy penalties."

While we may not prescribe any rule for the guidance of the register, it would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care.

It is said that if the register fails to issue the license upon a proper application he is liable to the penalty. Certainly this statute would not be construed to impose such penalty unless it was made to appear that such information was furnished the register as would induce a man of ordinary prudence upon reasonable inquiry to issue it.

Without reviewing the several cases, we think that they, certainly with the exception of *Harcum v. Marsh, supra,* lead to the conclusion that the defendant did not make reasonable inquiry. The judgment must be reversed and the plaintiff awarded a

New trial.

MURRAY v. WILLIAMSON.

(Filed November 10, 1903.)

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Sales—Exemptions—Fraudulent Conveyances.*

A debtor sold to a creditor goods found to be of the value of $227 in payment of a claim of $240. Subsequently the debtor made an assignment for the benefit of creditors, reserving his right to exemptions. In an action by the assignee against the creditor a judgment for the defendant was not error, as the sale was good as between the debtor and creditor, and if plaintiff had been permitted to recover the goods it would merely be for the benefit of the debtor.

ACTION by J. W. Murray against F. L. and J. W. Williamson, heard by Judge *W. R. Allen* and a jury at February Term, 1903, of the Superior Court of ALAMANCE County. From a judgment for the defendants the plaintiff appealed.

J. A. Long, C. E. McLean and *King & Kimball,* for the plaintiff.

W. P. Bynum, Jr., and *Parker & Parker,* for the defendants.

MONTGOMERY, J. D. C. Ligon, who had been merchandising under the firm name of S. E. Ligon & Co., being indebted to the defendants in the sum of about $240, sold and delivered to them his stock of goods with the understanding

that an inventory was to be taken of the goods, and if they should be of greater value than the debt due to the defendants, the surplus should be returned to Ligon. Afterwards, and on the same day, Ligon executed a deed of assignment for the benefit of his creditors generally, the assignee being J. W. Murray, the plaintiff. This action was brought by the plaintiff to recover of the defendants the stock of goods, or their value, delivered to them by Ligon on the grounds, first, that the alleged bill of sale, in fact, a security for debt, notwithstanding it purported to be a bill of sale; and, second, that it was procured from Ligon by undue influence exerted by the defendants. The issues, with the answers to the same, as they appear in the record, are as follows:

"1. Was the execution of the bill of sale, of date November 30, 1900, under which the defendant claims, and the delivery of the goods embraced therein, procured by undue influence?" Answer, "No."

"2. What was the value of the property in said bill of sale at the date thereof?" Answer, "$227.40."

"3. What part in value of the property in said bill of sale were consigned by the defendant?" Answer, "None."

"4. Were S. E. Ligon and D. C. Ligon partners at the time of the execution of the said bill of sale?" Answer, "No."

"5. If not, to whom did the property in said bill of sale belong?" Answer, "D. C. Ligon."

"6. Was the property embraced in the bill of sale delivered to the defendants before the execution of the deed of assignment to the plaintiff?" Answer, "Yes."

"7. Did the defendants agree at the time of the execution of the said bill of sale, and as a part of the consideration for the execution thereof, that after the payment of the debt due them from the property in the bill of sale they would return

any balance to the makers of the bill of sale?" Answer, "Yes."

"8. What amount, if any, was due defendants at the time of the execution of the bill of sale?" Answer, "$242.29."

Upon the verdict his Honor gave judgment in favor of the defendants, and against the plaintiff for costs. We see no error in the judgment. There is no necessity for us to go into a discussion of the legal effect of the bill of sale taken in connection with the promise of the defendants to return any surplus after the payment of the debt due to the defendants. The value of the goods as found by the jury was only $227.40, while the defendants' claim was $240. The debtor, Ligon, reserved his personal property exemption in the deed of assignment, and for whose good would it be if the plaintiff should recover the goods in this action? Surely not for the creditors'. The debtor only would be benefited. The sale of the goods to the defendants was good at least between the parties; and it would be a vain thing to order the goods to be delivered to the plaintiff and for him in turn to deliver them to Ligon.

No error.

DAVIS v. EVANS.

(Filed November 10, 1903.)

EVIDENCE—*Negotiable Instruments—Internal Revenue—Stamps.*

A promissory note, though not stamped with a revenue stamp as required by a federal statute, may be used in evidence.

ACTION by S. E. Davis against M. E. Evans, heard by Judge *O. H. Allen* and a jury at August Term, 1903, of the Superior Court of GRANVILLE County. From a judgment for the defendant the plaintiff appealed.

Graham & Devin, for the plaintiff.

No counsel for the defendant.

CLARK, C. J. The plaintiff sued on a promissory note, dated 7th November, 1898. The Court excluded the note when offered in evidence, because it was not stamped as required by the United States Internal Revenue Act of 1898. This was error.

The stamp is a fiscal provision of the United States Government for the purpose of raising revenue, which is to be enforced only in its own courts. Its non-observance does not affect the validity of the instrument when offered in evidence in a State Court. The provision that the unstamped paper shall not be admitted in evidence "in any court" applies only to United States Courts. Congress cannot prescribe rules of evidence for the State Courts. This was discussed and decided in *Height v. Grist,* 64 N. C., 739, cited and reaffirmed in *Dodson v. Moore, Ibid.,* 515; *Sellars v. Johnson,* 65 N. C., 109; and again, recently, in *Ratliff v. Ratliff,* 131 N. C., 427. To same effect, *Small v. Slocomb,* 112 Ga., 286; 53 L. R. A., 130; 81 Am. St. Rep., 50 (which cites cases from fifteen States holding the same doctrine); *Kennedy v. Rountree,* 59 S. C., 324; 82 Am. St. Rep., 841; *Richardson v. Roberts,* 195 Ill., 27; these last cases are under this act of 1898; Am. & Eng. Enc. (2 Ed.), 935, and cases cited; *Knox v. Rossi,* 25 Nev.; 48 L. R. A., 305; 83 Am. St. Rep., 566.

Error.

TRAVERS v. NORTH CAROLINA RAILROAD COMPANY.

(Filed November 10, 1903.

STOCK—*Corporations—Lost Certificate of Stock—Indemnity Bond—Acts 1885, ch. 265—Acts 1901, ch. 2, sec. 95.*

Acts 1885, ch. 265, authorizing a corporation to hold in escrow a new in lieu of a lost certificate of stock, is repealed by Acts 1901, ch. 2, sec. 95.

ACTION by S. W. Travers & Company against the North Carolina Railroad Company, heard by Judge *W. R. Allen* and a jury at April Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the plaintiff the defendant appealed.

F. H. Busbee & Son, for the plaintiff.
S. M. Gattis, for the defendant.

MONTGOMERY, J. This action was brought by the plaintiff to compel the defendant company to issue to the plaintiff a new certificate for shares of stock in the place of a certificate formerly issued and which is now lost or destroyed. The loss of the former certificate was proved to the satisfaction of the jury, and a judgment was rendered upon the verdict in the following words: "This cause coming on upon the pleadings, and the issue arising thereon having been found in favor of the plaintiff that the certificate of stock mentioned in the complaint was lost in July, 1889, and that the same is the property of the plaintiff, in accordance with the finding it is ordered and adjudged that the defendant North Carolina Railroad Company issue to the plaintiff S. W. Travers a certificate of five shares of stock in the North Carolina Railroad Company, in lieu of Certificate 3785, originally issued to

George E. Moore, within thirty days after April 20, 1903, and deliver the same to the plaintiff upon the execution and delivery of the bond hereinafter provided for. Before the plaintiff shall be entitled to receive the stock above mentioned he shall deliver to the North Carolina Railroad Company a justified bond in the sum of one thousand dollars, conditioned to indemnify any person, other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to have been lost. It is further ordered that the plaintiff recover of the defendant the cost of this action." The defendant excepted to the judgment on the ground that it should have contained a provision that the treasurer of the defendant company might hold the new certificate as an *escrow* for five years from the date of issuing it, before delivering it to the plaintiff, as was provided in chapter 265 of the acts of 1885. The act of 1901, chapter 2, entitled "An act to revise the Corporation Laws of North Carolina," contains a provision (section 95) as follows: "Whenever any corporation shall have refused to issue a new certificate of stock in place of one theretofore issued by it, or by any corporation of which it is a successor, alleged to have been lost or destroyed, the owner of the lost or destroyed certificate or his legal representatives may maintain a civil action in the Superior Court of the county in which the principal office of the corporation is located, to compel such corporation to issue a duplicate certificate of stock in the place of the certificate alleged to have been lost or destroyed; and if the issues of fact arising upon the pleadings shall be found in favor of the plaintiff, the Court shall make an order requiring the corporation or other party, within such time as it shall designate, to issue and deliver to the plaintiff a new certificate for the number of shares of the capital stock of the corporation which shall have been found to be owned by the plaintiff; in making the order the Court shall direct that the plaintiff

shall deposit such security as to the Court shall appear sufficient to indemnify any person, other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed. * * * Any person who shall thereafter claim any rights under the certificate so lost or destroyed shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order."

The contention of the defendant is that that part of the act of 1885 which confers on the treasurer the duty and power to hold, as an *escrow* for five years, the new certificate of stock before delivering it to the owner, is an additional and further security than the provision of 1901, section 95. There is nothing in the contention. The defendant could not have a more complete indemnity than is given to it in the act of 1901. The last sentence of section 95 of that act reads as follows: "Any person who shall thereafter claim any rights under the certificate so lost or destroyed shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order." Under that section, even if the stock alleged to have been lost or destroyed should come to light after the judgment of the Court decreeing the issue of a new certificate for that alleged to be lost or destroyed, the holder would have to look to the bond of indemnity alone for his remedy, as the decree of the Court adjudging that the original certificate of stock had been lost or destroyed cannot be again questioned and is full protection to the company. The act of 1885 provided that incorporated companies might require any stockholder claiming to have lost his certificate of stock to give a good and sufficient bond indemnifying the *company* against loss before issuing the new certificate. The act of 1901 is compulsory on incorporated companies that issue certificates of stock, and indemnity is not provided for the *companies* but for *"any*

person, other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed." The acts are inconsistent, and that of 1885 is therefore repealed by the one of 1901.

Affirmed.

DAVIS v. SUMMERFIELD.

(Filed November 10, 1903.)

1. ADJOINING LAND OWNERS—*Excavations—Damages—Independent Contractor.*

Where the damage caused by an excavation might have been reasonably anticipated, the owner of land upon which the excavation is made is liable therefor, though the negligence was that of an independent contractor.

2. INSTRUCTIONS.

An instruction containing a statement of a fact upon which the evidence is conflicting should not be given.

3. ADJOINING LAND OWNERS—*Independent Contractor—Excavations—Notice.*

The employment of an independent contractor to make an excavation adjacent to an abutting owner's wall does not relieve the proprietor from the obligation to give the adjacent owner timely notice of the nature and extent of the intended excavation.

PETITION TO REHEAR this case, reported in 131 N. C., 352.

R. W. Winston and *F. L. Fuller*, for the petitioner.
Boone, Bryant & Biggs, in opposition.

MONTGOMERY, J. One of the questions presented by this appeal is a most important one, and that question is whether

or not the owner of a city lot is liable for an injury done to an adjoining proprietor's brick wall, through the negligence of an independent contractor in excavating for the purpose of building a wall against and alongside the adjoining proprietor's wall, and where the excavation extended below the foundation of the wall of the adjoining proprietor.

There was evidence offered on the trial tending to show that the excavating, which the jury found was the cause of the injury to the plaintiff's wall, was done by the defendant himself, and from that evidence the jury might have found that the injury was caused by the direct and active agency of the defendant himself. But for the purposes of this discussion it will be assumed that the contractor performed the work.

For what negligent acts of an independent contractor employed to do work entirely under his own control which have resulted in injury to third persons the employer may be liable is a subject that has often been before the courts. The principle appertaining to that relation in respect to such liability is that when work is performed by a competent contractor under an agreement, which imposed upon him complete control and of such persons as he may employ to labor under him, such persons will be the servants of the contractor and not the servants of the employer, and the employer will not be liable for damages arising from injuries caused by negligence of the contractor or his workmen, for the reason that the relation of master and servant does not exist between the employer and the contractor's servant.

In the domain of the law of negligence the general rule is that where an injury has been sustained by one through the negligence of another, the party injured must seek his remedy against that one whose actual negligence caused the injury, and against that one only—he being alone liable. There are exceptions to this general rule, as, for instance, where the rela-

tion of master and servant exists. In that case the negligence of the servant is to be imputed to the maser in cases where the servant, in the performance of the act which causes the injury, is acting within the line of his duty—the scope of his employment. The reasoning upon which this exception rests is perfectly clear; and it is because the servant is acting for the master and by his direction, and the master having selected and being in control of his servant makes him his representative in the business in which he is employed. But in the complication of business and social affairs it is often necessary that some who follow special and independent vocations should be intrusted by others—owners of property—with the alteration or improvement of that property, and such persons are employed in many ways under varying conditions, not as servants to follow the method and plans directed and ordered by the employer, but as independent contractors to do work for which they are specially fitted to do, according to their own ideas and upon their own responsibility. In such a case the duty which the contractor owes arises out of the contract and not under the relation of master and servant, or principal and agent, and the maxim *qui facit per alium facit per se* does not apply; and neither public policy nor the relation between the employer and the independent contractor demands or requires that the negligence of either one should subject the other to liability to third persons. And it seems well established in principle that no liability exists in favor of third persons against the innocent party in such cases. Any person who may have been injured has his remedy against the real one who has done the wrong. There are, of course, exceptions to this rule of exemption, well settled and understood; such as in a case where a statute imposes a duty, or where the contract between the employer and the contractor is unlawful or provides for the execution of an act which when completed will create a nuisance. A statutory duty

cannot be delegated so as to exempt the one who has taken upon himself the duty imposed from responsibility; and one who creates a nuisance would be forbidden by public policy to shield himself, the real author of the wrong, from responsibility by casting it upon another. There is yet another class of cases where there is an exception to the exemption, and that is where the thing contracted to be done is necessarily attended with danger, however skilfully and carefully performed, said by *Judge Dillon* to be "intrinsically dangerous." There the employer cannot escape liability for an injury resulting from the doing of the work, although the act performed might be lawful. 2 Dillon on Mun. Corp., sec. 1029. And there is still another class of cases to be excepted from the exemption, and that is where the contract requires an act to be performed on the premises which will probably be injurious to third persons if reasonable care is omitted in the course of its performance. The liability of the employer in such a case rests upon the view that he cannot be the author of plans and actions dangerous to the property of others without exercising due care to anticipate and prevent injurious consequences. The case before us, it seems to us, falls under this exception to the general rule.

This last class of cases probably ought to be regarded as rather an extension of the one where the act to be done is "intrinsically dangerous" than a separate class.

In the case of *Bower v. Peate,* 1 Q. B. Div., 321 (1875-'76), the facts were almost identical with those in the present case. There the contention of the defendant was that the removal of the soil, to the support of which the adjoining owner was entitled, was not wrongful in itself, and that it only became so when followed by injury to the neighbor; and that, therefore, if such injurious consequences could have been averted by efficient means, artificial, for the natural support previously afforded by the soil, the removal of the soil

was not wrongful; that the defendant engaged the contractor to execute the work and to take the necessary precaution to protect the plaintiff's premises, and therefore, if the work had been done according to the contract, it would have been lawful and would have been attended with no injurious consequences; that the injuries arose from the negligence of the contractor alone, and the defendant was, therefore, entitled to the benefit of the general rule; that when a person employs a contractor to do work, lawful in itself and involving no injurious consequences to others, and damage arises to another from the negligence of the contractor or his servants, the contractor and not his employer is liable. The Court there said: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed from which, in the natural course of things, injurious consequences to his neighbor might be expected to arise, unless means are adopted by which such consequences might be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

In the case of *So. Ohio Ry. Co. v. Morey,* 47 Ohio St., 207; 7 L. R. A., 701, the Court said: "One who causes work to be done is not liable ordinarily for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has left the work, without

reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case a person causing the work to be done will be liable, though the negligence is that of any employee of the independent contractor."

In the case of *City and Suburban R. R. Co. v. Moores,* 80 Md., 352; 45 Am. St. Rep., 345, the Court said: "Even if the relation of principal and agent or master and servant do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work."

In *Bonaparte v. Wiseman,* 89 Md., 42; 44 L. R. A., 482, the facts were like those in the case before us, and the Court there cited with approval the two cases last above mentioned, and added: "Under these authorities the appellant would have been liable for injury happening to the house of the appellee from the excavation of his lots if it might reasonably have been anticipated that such injury would probably occur as a consequence of an excavation made in the location and to the depth appearing from the evidence in this case. The question whether such injury reasonably might have been anticipated as a probable consequence of the excavation was a question of fact for the jury, which would have been taken away from them if the appellant's fourth prayer had been granted."

The defendant asked his Honor to charge the jury, among other things, the following: "If the jury shall find that the

injury to the plaintiff's building was caused by excavating, which was done by C. H. Norton, an independent contractor, and if the jury shall further find that the work which he contracted to do was not necessarily or probably dangerous, and that he was skillful and careful, the defendant cannot be held liable for such injury, and the jury will answer the issue 'No.'" If the requested instruction had left out the statement of the fact that Norton was an independent contractor, the instruction would have been proper. *Bonaparte v. Wiseman, supra.* But containing that statement of a fact, his Honor was correct in refusing to give it. As we have said before in this opinion, there was evidence tending to show that the defendant himself did the excavating. The matter we have been discussing and have decided is not free from difficulty, and the decisions of the courts in reference to the same have not been uniform. The strong opinion of the Court of Appeals of New York in the case of *Engel v. Eureka Club,* 32 N. E., 1052; 33 Am. St. Rep., 692, delivered by *Chief Justice Andrews,* is not in line with this decision or those of the courts from which we have quoted. In that case, as we understand it, it is held that the employer is liable in no case except where the thing to be done is inherently, intrinsically and necessarily dangerous; and that in all cases where the injury arising from the negligence of the contractor is in the manner of doing it, and not in the thing itself contracted to be done, the contractor alone is liable. After a careful investigation of the matter we do not feel inclined to follow that view.

On another question presented by the appeal, that is, whether or not the plaintiff was entitled to notice from the defendant of his intention to dig below the foundation of her wall, the opinion delivered in this case on that point, as reported in 131 N. C., 352, is referred to and approved. In addition to what is there said on that question, it might be

well to notice another exception of the defendant in reference to the same matter. His Honor in his instructions to the jury among other things said: "The defendants contends that this work was done by an independent contractor; that he was a competent and skillful man, and that, therefore, if the work he contracted to do was not necessarily or probably dangerous, the defendant cannot be held liable for such injury. The Court charges you that the evidence is that Norton was a competent and skillful contractor; but the Court also charges you that the employment of an independent contractor, who is competent and skillful, to make an excavation upon a lot in near proximity to a neighbor's house in a populous city, and in a public thoroughfare, as on Main street in this instance, and to a depth of several feet below the level of the foundation of that house, does not relieve the proprietor from the obligation either to see that the contractor in doing the work protects his neighbor's wall by the exercise of due care, or to give the neighbor timely notice of the nature and extent of the intended excavation, that he may make due precaution for the protection of his own wall." The exception to that instruction cannot be sustained. It is correct in principle and is well supported by authority. *Bonaparte v. Wiseman, supra.*

"Thus the authorities are agreed that one who proposes to excavate or to make other alterations or improvements upon his own land, which may endanger the land or building of his neighbor, is bound to give the latter reasonable notice of what he proposes to do to enable him to take the necessary measures for the preservation of his own property." Thompson's Com. on the Law of Negligence, sec. 1109, and the cases there cited.

There was no evidence tending to show that the plaintiff in this case ever received any notice from the defendant or the contractor that it was the purpose of the defendant to exca-

vate below the foundation of the plaintiff's wall, or that she had any knowledge of such intention on his part.

Exceptions in this case were filed to many portions of the evidence, to the giving of each one of the eleven instructions asked by the plaintiff, to nearly every sentence of his Honor's charge, in chief, and to the refusal of his Honor to give thirty-one of the thirty-five special prayers for instruction asked by the defendant. The examination of this record has consumed a good deal of our time unnecessarily, but after its conclusion we think there was no reversible error.

Petition dismissed.

PEARCE v. FISHER.

(Filed November 10, 1903.)

ISSUES—*Damages—Trial.*

In an action by a tenant against his landlord and another tenant for damages caused by water leaking from a pipe it was error to submit the issue as to whether the plaintiff was injured by the defendants, or either of them, as an affirmative answer thereto would be indefinite.

ACTION by O. F. Pearce against B. J. Fisher and another, heard by Judge *Thomas A. McNeill* and a jury at September Term, 1902, of the Superior Court of GUILFORD County. From a judgment for the plaintiff the defendants appealed.

Scales, Taylor & Scales, for the plaintiff.
W. P. Bynum, Jr., and *J. N. Staples,* for the defendant.

WALKER, J. This action was brought by the plaintiff to recover damages for injury to his stock of goods alleged to have been caused by the negligence of the defendants.

In his complaint the plaintiff alleges that he leased from the defendant Fisher a store-room in Greensboro and conducted therein a mercantile business. That some time after the lease was made to him the defendant Fisher leased the rooms above the said store-room in the same building, to his co-defendant Clegg, for use as a hotel. That the defendants negligently permitted the plumbing in the rooms so leased to Clegg to become defective and leaky, so that the water escaped from the pipes and tub in the bath-room over the plaintiff's store and ran down upon his stock of goods, whereby the same was greatly damaged. The defendants denied the material allegations of the complaint. At the trial the plaintiff tendered certain issues for submission to the jury, which the Court refused to accept. In this ruling we concur, as the issues contained for the most part merely evidentiary facts and not the ultimate facts necessary to determine the rights and liabilities of the parties. But we think the Court erred in submitting the first issue to the jury, which was as follows:

Was the plaintiff injured by the defendants, or either of them, as alleged in the complaint?

The jury answered the issue "Yes." How can this Court decide from the verdict, as thus rendered, whether the jury intended to say that the plaintiff was injured by both of the defendants or by only one of them? To construe the verdict either way would be the merest conjecture. The answer of the jury to the issue would be just as appropriate if only one of the defendants had caused the injury, as it would be if by joint action they had caused it. It is impossible, therefore, for the Court to ascertain from the verdict, with any degree of certainty, the necessary facts upon which to base a judgment. Issues should not be submitted in such a way that when they are answered it will be left doubtful as to what the jury have found with respect to the liability of the

parties. The defendants excepted to this issue when it was submitted by the Court, and the exception must be sustained, for we think the verdict as it now stands is insufficient as the basis of a judgment. *Hatcher v. Dabbs,* at this term; *Strauss v. Wilmington,* 129 N. C., 99; *Tucker v. Satterthwaite,* 120 N. C., 118.

We would suggest that a separte issue be submitted as to each of the defendants, so that there will be no confusion or uncertainty hereafter as to what the jury have decided. This would seem to be the proper course for another reason, that the liability of the defendant Fisher may depend upon facts and legal principles quite different from those which will determine the liability of the other defendant, and with separate issues the jury will be better able to apply the law to the facts as to each of the defendants.

There can, of course, be but one assessment of damages—one satisfaction for the wrong, if any has been committed.

For the error in submitting the issue the verdict and judgment must be set aside and a new trial awarded.

New trial.

PARKER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed November 10, 1903.)

1. SUPREME COURT—*Opinions—Per Curiam—Courts.*

The filing of a written opinion in a case is discretionary with the supreme court.

2. CARRIERS — *Contracts — Negligence — Stipulations — Bills of Lading—The Code, sec. 1967.*

A common carrier cannot, by inserting in a bill of lading "subject to delay," contract against damages caused by its negligence.

3. CARRIERS—*Negligence—Burden of Proof.*

A carrier, though accepting a shipment under a contract, "subject to delay," has the burden of showing the exercise of due diligence to avoid delay in carrying and delivering the goods.

4. EVIDENCE—*Carriers—Stipulations—Negligence.*

In an action for damages for delay in shipment of perishable fruit a newspaper published at the destination is admissible as proving negligence of the carrier, under an agreement permitting the use of copies of the paper on the question of the condition of the market and market value.

5. CARRIERS—*Negligence—Delay—The Code, secs. 1964, 1967.*

The Code, sec. 1967, allowing a carrier five days within which to ship goods, does not relieve it from its common-law liability for loss caused by unreasonable delay in the shipment thereof.

6. PLEADINGS—*Actions—Contracts—Torts.*

In an action for damages caused by delay in shipment of goods it is immaterial whether the action is brought *in assumpsit*, upon a breach of contract or in case for the violation of a common-law duty, or on a tort based on a contract.

PETITION TO REHEAR this case. For former decision without an opinion, see 131 N. C., 827.

F. A. Daniels, G. B. Elliott and *W. C. Munroe,* for the petitioner.

Isaac F. Dortch and *W. T. Dortch,* in opposition.

DOUGLAS, J. This case is now before us on a rehearing. It was affirmed by a *per curiam* judgment on the authority of *Pipkin v. Railroad,* 128 N. C., 615, a case against the same defendant and involving a similar cause of action. The latter case was also decided without an opinion, as it was thought that the principles of law governing the case had been substantially settled. In his petition to rehear the plaintiff says:

"It was error to decide this case by a *per curiam* judgment, without an opinion in writing by the Court, containing its reasons in full." We cannot admit the error so broadly assigned. It is our duty to *decide* all cases brought before us, but whether a written opinion shall be filed is entirely within our discretion. A failure to do so is in no sense a reflection upon counsel, nor is it any criterion as to the ability or learning with which the case may have been argued. It simply means that we do not think it necessary. It has been seriously questioned whether it would not be better to have fewer written opinions, as general principles may be weakened or confused by multitudinous explanations. If the essential principles upon which a case depends have been already settled, we can add but little, if anything, to what has already been said; while the discussion of questions not essential to its determination, even if argued by counsel, may well be omitted in the interest of time and space. Still, it is proper at all times for counsel to ask for a written opinion when they deem it necessary for the furtherance of justice; but it is equally proper for us to decline it when we deem it unnecessary. In the present instance, especially in view of the numerous cases depending upon the one at bar, we think it entirely proper that a witten opinion should be asked and given. This is especially so in view of the following statement in the petition:

"The principles involved in this decision are of great importance to each and every one of these shippers as well as to the carriers doing business in this State. It would seem from this judgment as it now stands that this petitioner has been remiss in some particular. If so, a written opinion would enable it to repair its practice, if it is remiss, and provide against a repetition of the circumstances that brought about this and the various other cases brought against it in this respect. Without such a written opinion, this petitioner

is powerless to determine wherein it has been remiss, if it has been, for this Court has not enunciated the matter in which the law has been neglected or violated. Your petitioner, therefore, urges, with all respect, but with emphasis, that an opinion is necessary in this case, not only for a determination of the case at bar, but as a guide for future transactions within this State."

In the discussion of the principles involved in this case we will follow the order in which they appear in the petition. It says: "Your petitioner respectfully points out the following as questions that arise in the determination of this case, which has not heretofore been passed upon by this Court:

2. *Principles of law not heretofore decided in North Carolina.*

(A.) Whether this plaintiff, by sounding his action in tort, can thereby annul and render of no effect the terms of the contract he has made with the carrier."

We do not think that this question is before us; certainly not in the form in which it is stated. It assumes that there was a valid contract existing between the plaintiff and defendant whereby the defendant was relieved from all damages resulting from delay, no matter from what cause such delay might arise. In our opinion there was no such contract. It is true that the words "subject to delay" were written on the bill of lading, but we do not think that they modified its essential character. If they meant that the melons were accepted for shipment subject to delays arising from causes beyond the control of the carrier, they merely expressed one phase of the carrier's liability under an ordinary "Owner's Risk" bill of lading. If such endorsement was intended to relieve the carrier from liability for delay arising from its own negligence, it would not be enforcible. *Rocky Mt. Mills v. Railroad,* 119 N. C., 693; 56 Am. St. Rep., 682; *Mitchell v. Railroad,* 124 N. C., 236; 44 L. R. A., 515;

Gardner v. R. R. Co., 127 N. C., 293; *Hart v. Railroad,* 112 U. S., 331; *Ins. Co. v. Erie, etc., Trans. Co.,* 117 U. S., 322; *Liverpool Steam Co. v. Ins. Co.,* 129 U. S., 397; *Ins. Co. v. Compress Co.,* 133 U. S., 387; *Constable v. Steamship Co.,* 154 U. S., 51.

In *Gardner v. Railroad,* 127 N. C., 293, the Court says, on page 296: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence."

Hale on Bail. and Car., sec. 90, thus lays down the rule: "By express agreement, common carriers may limit their liability to that of ordinary bailees for hire; but they cannot stipulate against liability for negligence, either of themselves or of their agents or servants."

Again, the same author says in section 82: "Even where the loss is caused by a peril against which carriers are not insurers, they are nevertheless liable, if they fail to use reasonable care and diligence to avoid all perils, including the excepted perils."

The first issue was: "Did the defendant exercise due diligence, under all the circumstances, to avoid delay in carrying and delivering plaintiff's melons?" To this the jury answered "No." The burden of this issue was upon the defendant. *Mitchell v. Railroad,* 124 N. C., 236; *Hinkle v. Railroad,* 126 N. C., 932; 78 Am. St. Rep., 685, and cases there cited. The rule is clearly laid down in 2 Greenleaf on Evidence, section 219, as follows: "If the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care."

The rule is thus stated in 5 A. & E. Ency. Law, 2d Ed., 254: "It seems, however, that on proof of a delay in delivery a *prima*

facie case is made out against the carrier, and the burden of proof rests upon it to show that the delay was from a cause for which it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier and not easily ascertained by a shipper."

In *Hinkle v. Railroad,* 126 N. C., 932, this Court says, on page 938: "This rule, which is the natural result of the *prima facie* liability of the common carrier, is further strengthened by the universal acceptance of the principle that where a particular fact necessary to be proved rests peculiarly within the knowledge of a party, upon him rests the burden of proof. 5 Am. & Eng. Enc. (2d Ed.), p. 41; Best on Ev., sec. 274; 1 Greenleaf, sec. 79; Starkie on Ev., sec. 589; Rice on Ev., sec. 77; *Railroad v. U. S.,* 139 U. S., 560; *State v. McDuffie,* 107 N. C., 885; *Govan v. Cushing,* 111 N. C., 458; *Mitchell v. Railroad, supra.*" In fact, the difficulty, or rather the practical impossibility, of the shipper proving how his goods were lost while in the custody of the carrier led to the adoption of the common-law rule holding the carrier as an insurer. The reason of the rule is thus stated by *Holt, C. J.,* in *Coggs v. Bernard,* 2 Lord Raymond, 909, 918: "The law charges this person (the common carrier) thus instructed to carry goods against all acts but acts of God and the enemies of the King. For, though the force be ever so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a political establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons that they may be safe in their ways of dealings; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, or combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be dis-

covered. And this is the reason the law is founded upon that point."

The reason is thus stated in *Riley v. Horne*, 5 Bing., 217: "When goods are delivered to a carrier they are usually no longer under the eye of the owner. He seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward—namely, that of taking all reasonable care of it—the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the King's enemies."

In *Roberts v. Turner*, 12 Johns., 232, 7 Am. Dec., 311, *Spencer, J.*, says: "The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods to prevent combinations, chicanery and fraud."

We have placed upon this bill of lading the only construction that would be legally enforcible; but if there were two legitimate constructions we would be compelled to adopt that most favorable to the shipper, as all such limitations of liability, being in derogation of common law, are strictly construed, and are never enforced unless shown to be reasonable. This principle is too well settled by our own decisions to require the citation of other authorities. *Wood v. Railway*, 118 N. C., 1056; *Mitchell v. Railroad*, 124 N. C., 236; *Hin-*

kle v. Railroad, 126 N. C., 932; *Gardner v. Railroad,* 127 N. C., 293; *Mfg. Co. v. Railroad,* 128 N. C., 280. In *Wood v. Railroad,* 118 N. C., this Court says, on page 1063: "Such stipulations contained in a contract are a part of the contract, but they do not contain any part of the obligation of the contract. They are conditions in the nature of estoppels, and, when enforced, operate to prevent the enforcement of the obligations of the contracts. Such restrictions, when reasonable, will be sustained. But as they are restrictions of common-law rights and common-law obligations of common carriers, they are not favored by the law."

That such a rule of construction is not peculiar to this State is shown by the recent case of *Texas, etc., R. Co. v. Reiss,* 183 U. S., 621, in which the Court says, on page 626: "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies using it. The language is chosen by the company for the purpose, among others, of limiting and diminishing their common-law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument; and as the Court is to interpret such language, it is, as stated by *Mr. Justice Harlan,* in delivering the opinion of the Court in *National Bank v. Ins. Co.,* 95 U. S., 673, 'both reasonable and just that its own words should be construed most strongly against itself.' To the same effect is *London Assurance Co. v. Companhia, etc.,* 167 U. S., 149, and *Queen of the Pacific,* 180 U. S., 49."

In the case at bar it does not appear that the plaintiff received any consideration whatever for the further limitation of liability (if there were any) caused by the endorsement of the words "subject to delay" on the bill of lading, nor does

it appear that he was given any alternative other than its acceptance. There was no further reduction of rate beyond that ordinarily charged on a bill of lading at "owner's risk," and it appears that the agent was instructed not to receive perishable freight on any other terms. On this ground alone, if for no other, we think that such a stipulation would be void as being unreasonable and without consideration. What could the plaintiff do with a car-load of watermelons at a railway station except to ship them on any terms and trust to luck or to law to get back at least some part of their value? The acceptance and shipment of the melons by the defendant were neither a favor nor a concession to the plaintiff, as it was required to do so by law. If it had been, we do not see how he was benefited either in temper or pocket by being subsequently told that the melons had brought enough to pay the freight. Regarding the public convenience as a dominating motive for the creating of a *quasi* public corporation, we may adopt the language of this Court in the well-considered case of *Rocky Mount Mills v. Railroad,* 119 N. C., 693, 56 Am. St. Rep., 682, and say "The convenience to him is not perceived."

The petition says: "The second point not heretofore decided by this Court, but apparently approved by this decision, is: (B) Is an extract from a newspaper published in the city of New York, without explanation of its authority or from whom the statements contained are obtained, legitimate evidence to prove negligence of this defendant or its connections?"

As a general proposition of law, disconnected from the facts of this case, we would be inclined to a negative answer without much discussion; but as we think that the extracts in question come clearly within the agreement of counsel, there was no error in their admission. The agreement was as follows: "It is agreed that either party may introduce in evi-

dence, without further proof than the production of the paper, such copies as they may desire of the paper known as *The Producer's Price Current* upon the question of the condition of the 'market and market value.'" These terms are by no means synonymous. The term "condition of the market" does not simply mean the market value of melons, but includes the surrounding facts and circumstances that directly tend to affect their value upon the market.

The defendant's petition further says: "A further point presented and not determined by this petition is: (C) When a shipper makes a special contract with a carrier, and thereby agrees that his goods shall be shipped 'subject to delay,' does he thereby accept the conditions existing on the carrier's road at the time he makes the contract, or may he, even though he so contracts, complain of conditions then existing and recover for acts of negligence that were committed prior to the making of such special contract, even though the shipper knew of such negligence and conditions at the time?" The point involved in the defendant's question assumes too much and is too broadly stated to admit of a definite answer in this case. All that we can say is that it is the settled ruling of this Court, in accordance with the practically unanimous concensus of authority, that the highest principles of public policy will not permit a common carrier to exempt itself by contract from liability for damage directly resulting from its own negligence.

Again the petition asks: "Section 1964 of The Code makes it obligatory upon all railroad companies to accept freight offered, under penalty of $50 per article for refusal. This being so, is this petitioner entitled to the five days allowed by section 1967 of The Code before becoming responsible for failure to ship the same?" In our opinion these sections of The Code apply simply to the penalties therein imposed, and are not intended to limit the common law liability of common

carriers. To hold otherwise would put all perishable freights at the mercy of the carrier. These sections were fully considered in *Carter v. Railroad,* 126 N. C., 437, and same case, 129 N. C., 213. As a further error of law, the petition suggests that "This Court apparently overlooked the fact that a contract 'subject to delay,' or a contract whereby a shipper agrees that his goods may be subjected to a delay of more than five days, is expressly authorized by section 1967 of The Code." We can only repeat what we have already said, that this section applies only to the penalty imposed; but if its purpose were of wider scope it would not apply to delays arising from the negligence of defendant.

The petition again suggests that "This Court apparently overlooked the fact that the Court below charged the jury that it was for them to determine whether the goods in question were shipped on a special contract, and refused to charge that the goods were shipped on such a special contract." We presume that his Honor left the jury to pass, not upon the meaning of the contract, but upon the fact whether the contract, as contended for by the defendant, was agreed to by the plaintiff. In any event the defendant was not injured by the submission of this question under the construction placed upon the contract by this Court. If the endorsement, "subject to delay," had no legal effect, it made no difference whether or not it was assented to by the plaintiff. The petition further suggests as error that "This Court overlooked the fact that the Court below admitted newspaper extracts to prove the existence of a strike in New York, and to prove what was done by the railroad to relieve the situation." We think this exception is met by the agreement of parties to admit the paper as before stated.

The petition again suggests as error that "this Court apparently overlooked the fact that it was error of law to admit the testimony as to a strike and the wages paid employees in

New York by other companies, when such information was based on hearsay and the strike occurred before the plaintiff made his shipment under special contract." The defendant contends that this admission was "error at law, both on hearsay ground and as matters tending to confuse the jury and take their attention from the issue."

This exception is the only one that has given us any trouble, but in the view we take of the case it cannot be sustained. The evidence does not appear to have been entirely hearsay, as it apparently referred to what was said and done at a meeting at which the witness was personally present. It appears to have been suggested by a question asked by the defendant's counsel on cross-examination. It does not refer to the strike in direct terms. In fact, the first allusion to the strike, as far as we can see, is in the direct testimony of Townsend, a witness for the defendant. The strike is directly referred to as the cause of the delay in handling melons in a newspaper article introduced by the defendant, as shown on page 50 of the printed record. As we have said, the defendant lay under the burden of showing that the unreasonable delay in the delivery of the melons and the consequent damage to the shipper did not arise from its own negligence. The plaintiff had made out his case when he showed the shipment of the melons, their unreasonable delay in transit and the resulting damage. He had no occasion to go into any other question. If the defendant saw fit to attempt to excuse its delay by evidence of a strike it would seem that similar evidence would be equally available to the plaintiff in rebuttal. It was not at all necessary to the plaintiff in any other aspect. As was held in *Hinkle v. Railroad, supra,* the unreasonable delay was not only a breach of contract, but was in itself evidence of negligence.

We may here repeat what was said in *Mitchell v. Railroad,* 124 N. C., 236, on page 239: "It seems to us that the error

lies in a misapprehension of the true nature of the bill of lading. It is not an agreement primarily intended to release the common-law liability of the carrier, but, as said in *Pollard v. Vinton,* 105 U. S., 7, 'It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter it is a contract to carry safely and deliver.' The safe carriage and delivery are the essential objects of the contract, and it is the duty of every party to a contract to comply with his agreement or show such facts as will excuse his non-performance. This is especially so where the contract is made in the performance of a public duty.

"It is the duty of a common carrier, irrespective of contract but subject to reasonable regulations, to accept, safely carry and deliver all goods entrusted to it. If the goods are lost it must show what became of them, and if they are damaged it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a *prima facie* case when he shows the receipt of goods by the carrier, and their non-delivery or delivery in a damaged condition. Any further defense is in the nature of confession and avoidance."

Whether the plaintiff sued *in assumpsit* upon a breach of contract, or in case for the violation of a common-law duty, or on a tort based on a contract, would not seem to be material under our present system of Code pleading. His cause of action was the pecuniary loss resulting to him from the damage done to his melons by the negligent and unreasonable delay in their transmission by the common carrier, and this was clearly stated in the complaint.

We have referred principally to our own decisions, because it seemed to us that the questions necessary for the determination of this case had been already settled.

Petition dismissed.

PERKINS *v.* BRINKLEY.

(Filed November 10, 1903.)

1. EVIDENCE—*Maps—Deeds—Boundaries.*

Where no evidence is offered as to when a map found among the grantor's books was made, or that it was in existence and referred to by the parties at the execution of the deed, it is inadmissible to show the land included in the deed.

2. EVIDENCE—*Agency—Declarations—Boundaries.*

Where a husband is in possession of land as agent of his wife, his declarations to strangers in regard to the boundaries of her land are not admissible against her.

3. EVIDENCE—*Declarations—Deeds—Boundaries.*

Conversations with the grantor in a trust deed, without evidence that they were had with or were known to the trustee or *cestui que trust*, or that the deed was made with reference thereto, are inadmissible in a suit involving the construction of the deed.

4. EVIDENCE—*Trusts—Boundaries.*

In a suit by a *cestui que trust* for rents due from the trustee, testimony as to a settlement of the boundaries between plaintiff and grantor's children is inadmissible where defendant had taken possession of and rented the land.

ACTION by Mary E. Perkins against Abram Brinkley, heard by Judge *Frederick Moore* and a jury, at June Term, 1903, of the Superior Court of WARREN County. From a judgment for the plaintiff the defendant appealed.

Pittman & Kerr, for the plaintiff.

Thomas N. Hill, Day & Bell and *Tasker Polk*, for the defendant.

CONNOR, J. This is the defendant's appeal. It appears from the record that upon the death of Dr. W. M. Perkins,

January 2, 1901, the defendant collected the rents from the land conveyed to him in trust. He testified: "I collected the rents for 1901 and 1902 and paid them to the plaintiff and her agents, Egerton and Newell; 1901 rents paid her was $102.50, less the taxes." Upon his cross-examination he said: "I simply paid what I got from the north side of the road; have never paid her anything from the south side." The case on appeal states that "The plaintiff contended that the contract or marriage settlement embraces all the B. C. Edmunds land of Dr. Perkins on both sides of the road covered by the description in that instrument, and that there was a balance of $97.50 due by the defendant on account of rents for 1901. The defendant contended that only five hundred acres on the north side of the road were embraced, and that nothing was due." His Honor charged the jury that "If they believed the evidence the description included the land on both sides of the road, and that they must take that into consideration in estimating its rental value." To this instruction the defendant excepted. The land conveyed to the defendant is described as "one tract known as the B. C. Edmunds land, containing 500 acres, including the dwelling and other houses thereon, said tract of land adjoining the lands of William Powell, William Liles, W. M. Perkins and others." W. C. Powell testified that he knew the Edmunds land. "All the Edmunds land is joined together, except that a road runs through it; it is bounded as described in the complaint; my land is on the north side; so is William Liles's." Abram Brinkley, the defendant, testified that the "description in the contract could embrace the Edmunds land on both sides of the road; I think it adjoined Moore's land, January 25, 1873; Moore's land was on the south side of the road." It was shown that the portion of the B. C. Edmunds land on the north side of the road contained 552 acres, and on the south side 103 acres. F. H. Taylor, for the defendant, testified that

"the description in the contract embraces 552 acres on the north side of the road; same description covers the entire Edmunds tract; by deeds there are 552 acres on the north side and 103 acres on the south side of the road." For the purpose of showing that only the land on the south side was conveyed by deed, the defendant offered to put in evidence a map found among the papers of Dr. W. M. Perkins. The map was a drawing representing a tract of land; in the center were written, in the handwriting of Dr. Perkins, the words "containing 500 acres conveyed to Abe Brinkley as trustee, as annuity for M. E. Cheek during her life." There are also, in the same handwriting around the lines of the map, entries describing the lines. The defendant testified in regard to this paper: "I got this paper as executor; found it in one of Dr. Perkins' books. * * * I qualified as executor; handwriting on this paper is Dr. Perkins'. It was lying in one of his account books. There were other loose papers lying in the book. Don't know what other papers were in the book. * * * Book was valuable. It was an account book where Dr. Perkins kept medical and other accounts against people." The Court refused to admit the paper and defendant excepted. In the absence of any evidence as to when the map was made, or that it was known to the defendant or Mrs. Perkins, or that it was in existence and referred to by the parties at the time of the execution of the deed, his Honor correctly excluded it. In *Hall v. Eaton,* 139 Mass., 217, the defendant offered to introduce a map for the purpose of explaining a latent ambiguity in a deed. The Court in passing upon an exception to the refusal of the Court to permit it says: "This plan is not referred to in the deed and was not seen by the purchasers. The only effect of this evidence would be to show that the grantor knew that the plat did not correspond with the one on the plan, and did not inform the

grantees. *Webb v. Hall,* 18 N. C., 278 (281 near bottom of page.)" His Honor properly excluded the map.

The plaintiff offered to show by witnesses that they had conversations with Dr. Perkins after the execution of the deed, for the purpose of showing that the 500 acres was the only land embraced in the marriage contract. Upon the objection of the plaintiff the testimony was excluded and the defendant excepted. It was shown that Dr. Perkins rented out the land, and as we construe the testimony he was the agent of his wife. The defendant argues that being in possession his declarations are competent. The general rule is well settled that the declarations of a vendor in possession of land are competent for the purpose of explaining, qualifying or characterizing his possession. This principle cannot be extended to the declarations of an agent in possession in disparagement of the title or boundaries of his principal. Dr. Perkins' possession was his wife's possession, and his declarations in regard to the boundaries of her land, made to a stranger, cannot be competent against her. If made to Brinkley, her trustee, and acted upon by him in renting the land, a different question would be presented. His Honor correctly excluded the testimony. The defendant also offered evidence tending to show conversations with Dr. Perkins prior to the execution of the deed. There is no suggestions that these conversations were had with, or known to, either the defendant or the *cestui que trust,* or that the deed was made with any reference to such conversations. We think the evidence was properly excluded.

The testimony in regard to a settlement of the boundaries made between the plaintiff and the children of Dr. Perkins was properly excluded. The defendant having taken possession and rented the land after Dr. Perkins' death, should have accounted to the plaintiff for all of the rents received.

We concur with his Honor in the opinion that the deed, in

the light of the evidence, included the B. C. Edmunds land on both sides of the road.

The judgment must be affirmed.

MONTGOMERY, J., did not sit on the hearing of this case.

HARVEY v. JOHNSON.

(Filed November 10, 1903.)

1. HUSBAND AND WIFE—*Jurisdiction—Justice of the Peace—Superior Court—Negotiable Instruments.*

   The superior court has no jurisdiction of an action on a note for $275; but on which the balance was less than $200.

2. HUSBAND AND WIFE—*Parties—Negotiable Instruments—The Code, sec. 178.*

   In an action on a note seeking to charge her personal estate, the wife and husband must be joined as parties defendant.

3. HUSBAND AND WIFE—*Parties—Judgments—The Code, sec. 178.*

   No judgment can be rendered against a husband who is joined with his wife in an action under The Code, sec. 178.

4. HUSBAND AND WIFE—*Negotiable Instruments—Separate Property of Wife—The Code, secs. 1828, 1831, 1832, 1836.*

   A note signed by the husband and wife, binding her separate estate for the payment of the debt, the amount therein having been advanced for the benefit of her separate estate, is sufficient to bind her separate personal estate.

5. HUSBAND AND WIFE—*Exemptions—Judgments—Executions—The Code, sec. 443.*

   In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution.

6. HUSBAND AND WIFE—*Separate Property of Married Women—Exemptions—Acts 1891, ch. 91.*

Acts 1891, ch. 91, requiring the private examination of a married woman to a chattel mortgage on household and kitchen furniture, does not apply to a note signed by husband and wife binding her separate personal estate.

7. HUSBAND AND WIFE—*Separate Estate of Married Women—Superior Court—Jurisdiction.*

The superior court has jurisdiction of an action seeking to charge the separate estate of the wife, though the note sued on is less than $200.

8. HUSBAND AND WIFE—*Negotiable Instruments—Separate Estate of Married Women.*

A note signed by husband and wife without a privy examination of the wife cannot be enforced against her separate real estate.

CLARK, C. J., dissenting in part.

ACTION by Harvey, Blair & Company against J. A. Johnson, heard by Judge *George H. Brown,* at February Term, 1902, of the Superior Court of WARREN County. From a judgment for the defendants the plaintiff appealed.

Pittman & Kerr, for the plaintiff.
B. G. Green, for the defendants.

WALKER, J. This action was brought in the Superior Court upon a note of which the following is a copy:

$275.00. WARRENTON, N. C., Dec. 14, 1899.

On demand we or either of us promise to pay to Harvey, Blair & Co., with interest from date, at the rate of six per cent. per annum, the full and just sum of two hundred and seventy-five dollars for value received. And Ella B. Johnson, one of the principals in this note, binds her own separate estate for the payment of this note, the aforesaid two hundred

and seventy-five dollars having been advanced by aforesaid creditors for the benefit of her said estate.

S. B. JOHNSON, (Seal.)
his
J. A. JOHNSON, X (Seal.)
mark.
ELLA B. JOHNSON, (Seal.)

The plaintiff alleges that at the time the action was commenced the sum of $170.63 was due on the note and that the *feme* defendant Ella B. Johnson was at said time seized and possessed of a house and lot in the town of Warrenton, and also owned household and kitchen furniture which is worth $350.

The defendants S. B. and J. A. Johnson answered and admitted that they owed the balance alleged to be due on the note, but averred that the Court had no jurisdiction of the action upon the contract, as the amount alleged was less than two hundred dollars. The *feme* defendant answered and alleged that false representations were made in order to induce her to sign the note. She also avers that the lot in Warrenton is worth less than $1,000, and she denies her liability upon the note.

The cause came on for trial, and upon motion of the defendants to dismiss the action on the pleadings the Court dismissed the same upon the following grounds:

1. Because it does not appear that the *feme* defendant executed in due form a sufficient conveyance charging her separate estate.

2. That no consideration inured to the benefit of the separate estate of Ella B. Johnson, and she had no capacity to make the said contract.

3. That it appears from the complaint that her separate personal estate does not exceed the personal exemption of five hundred dollars allowed by law.

4. That as to the other defendants, the sum demanded is under two hundred dollars, exclusive of interest.

The judgment of the Court below was right as to the defendants S. B. and J. A. Johnson. They could not be sued in the Superior Court on a note the balance due upon which was less than two hundred dollars. It was proper to join J. A. Johnson with his wife as a defendant in this action, by which it was sought to subject her separate estate to the payment of the note, but he is only required to be a party for the protection of the interests of his wife, and no judgment could be rendered against him. The Code, sec. 178; *Nicholson v. Cox,* 83 N. C., 48; *Vick v. Pope,* 81 N. C., 22. We think, though, that the Court erred in dismissing the action as to the defendant Ella B. Johnson. The grounds upon which the action was dismissed as to her are not tenable. It appears that she executed the note with the written consent of her husband, and expressly charged her separate estate with its payment, and it further appears on the face of the note that the consideration was money advanced for the benefit of her separate estate. This would seem to be quite sufficient to make her liable to the plaintiff through a charge upon her separate personal estate, at least. *Flaum v. Wallace,* 103 N. C., 296; *Farthing v. Shields,* 106 N. C., 289; *Bailey v. Barron,* 112 N. C., 54; *Weathers v. Borders,* 124 N. C., 610.

The remaining contention of the defendant that, as it appears the separate personal estate of Mrs. Johnson does not exceed the exemption of $500 allowed her by law, she is therefore not liable to the plaintiff, cannot be sustained. The fact that the person property is of less value than five hundred dollars does not affect the jurisdiction or power of the Court to declare that it shall be charged with the payment of the obligation she has assumed. The law, by so charging her separate personal estate with the payment of this debt, does not deprive her of her personal property exemption. The judgment

against her will be enforced just as a judgment against a person *sui juris* would be, that is, by execution, but with this exception, that the law requires the execution to be levied only on her separate estate. The Code, sec. 443, provides that "an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise." When the sheriff receives an execution against a married woman, directing him to levy the same and collect the money due upon the judgment out of her separate estate, it is his duty to set apart and allot the exemption of the defendant, just as he is required to do in other cases. *Bailey v. Barron, supra; Bank v. Ireland,* 127 N. C., 238.

We have not overlooked the fact that the personal property of which she is said to be possessed is household and kitchen furniture. Chapter 91 of the Acts of 1891, p. 89, provides that whenever household and kitchen furniture is conveyed by chattel mortgage or otherwise, as allowed by law in this State, the privy examination of any woman interested in it shall be taken. This Court has construed that act as applying only to chattel mortgages and conveyances of a like kind which create liens upon the property. *Kelly v. Fleming,* 113 N. C., 133. It has no application to a case like the one now under consideration. In *Farthing v. Shields, supra,* the Court said that the reason which greatly influenced the Court to decide in *Flaum v. Wallace* that the wife could charge her separate personal estate with the mere written consent of her husband was that she could convey or transfer her personal property with his written consent, and therefore she should be allowed to charge it, while in the case of real property she could not convey it without privy examination, and therefore she should not be permitted to charge it unless it is done in the same way. Under the act of 1891 she is not forbidden to convey household and kitchen furniture absolutely, though she

cannot mortgage it or convey it so as to create a lien upon it without privy examination. The reason, therefore, for forbidding her to charge her land with the payment of her debts, either expressly or by implication arising out of the nature of the particular contract, does not apply to this case.

It is suggested that while the *feme* defendant is liable on the contract she is so liable as if she were a *feme sole* and not only by way of charge upon her separate estate, and that as the amount sued for is under two hundred dollars the action should have been brought before a justice of the peace, and the Superior Court therefore had no jurisdiction. We cannot yield to this suggestion. A married woman is not liable on her contract as if she was not under coverture except in cases provided in sections 1828, 1831, 1832 and 1836 of The Code. She is not liable on her contract at all, as we will see hereafter. This Court has held in a long and unbroken line of decisions that she is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she possesses separate property, the Court in the exercise of its equitable jurisdiction will so far recognize her agreement as to make it a charge thereon. But even in that case and in that jurisdiction her contract has no force whatever as a personal obligation or undertaking on her part. *Dougherty v. Sprinkle, supra; Pippen v. Wesson,* 74 N. C., 437. If a married woman borrows the sum of one hundred dollars and gives her bond for the same she is no more liable upon the bond than she was at common law. *Huntley v. Whitener,* 77 N. C., 392. A *feme covert* is at law incapable of making any executory contract whatever; she cannot make any legal contract, that is, one which will impose a personal obligation, even with the written consent of her husband, nor even if the contract is for her benefit and advantage. *Flaum v. Wallace, supra; Farthing v. Shields, supra.* The liability upon the agreement of a *feme covert* being therefore a mat-

ter of purely equitable cognizance, it must be enforced by an action in a court having jurisdiction to administer equity affirmatively, and not in the court of a justice of the peace, where there is no such equitable jurisdiction. *Holden v. Warren,* 118 N. C., 326. The legal effect of a married woman's engagement, therefore, is not like that of a person *sui juris.* It only creates a right in equity in behalf of the person with whom the agreement is made to have the same enforced against her separate estate, and she can never be liable to a personal judgment for its satisfaction.

It is claimed that these principles have been modified by the decision of this Court in *Neville v. Pope,* 95 N. C., 346, and other like cases. In order to show that this cannot be so it is only necessary to say that in the case cited the defendant made no defence and judgment by default was entered, so that it did not appear to the Court at the time of the judgment that she was a married woman, and the Court proceeded upon the assumption, as it had a right to do, that she was not, but was personally liable for the debt. The Court clearly intimated, though, that if she had entered the plea of coverture she would have been successful in the suit. Nor do we think that chapter 617 of the Acts of 1901, as construed by this Court in *Finger v. Hunter,* 130 N. C., 532, has changed this law in any respect. It is provided by that act merely that a married woman shall be liable for repairs and improvements put upon her property with her consent or procurement, and that in such a case she shall be deemed to have contracted for the same. The act of 1901 is an amendment to section 1781 of The Code, which subjects the property upon which the repairs or improvements are made to a lien. This brings the case directly within the reason for the decision in *Smaw v. Cohen,* 95 N. C., 85. In that case the jurisdiction of the justice was sustained by reason of the express requirement of the statute that a suit against a person to

enforce such a lien, when the amount is less than two hundred dollars, shall be brought in a justice's court. The case of *Finger v. Hunter,* therefore, does not vary the general principle in regard to the enforcement of the agreements of married women, which we consider to be so well established by the decisions of this Court that it should not be changed except by legislative enactment. It is our duty to construe or expound the law and not to make it. We must ascertain what it is and not what it should be. The latter function belongs only to the law-making power.

It would seem hardly necessary to refer to the class of cases in which the Court has sustained the right to enforce the contract of a married woman, who is a free-trader under sections 1827, 1828, 1831 and 1832 of The Code, or a contract made by virtue of any other statutory provision authorizing her to contract as if she were *sui juris.* In such a case it is too clear, even for argument, that she is personally liable just as if she were not married or as if she had contracted as a *feme sole.* Her obligation is a legal one and not a mere equitable charge upon her separate property, and must be enforced in the court having jurisdiction of such cases, which will be determined by the amount involved.

The case of *Dougherty v. Sprinkle, supra,* as the transcript in that case will show, was brought not to enforce a mechanic's lien or any kind of lien, but to recover upon an implied promise to pay the reasonable value of work and labor done and material furnished. It was in the nature of an action of *assumpsit.* The principle laid down in that case was no more impaired by the act of 1901, chapter 617, as construed in *Finger v. Hunter,* than it was affected by the decision in *Smaw v. Cohen.* The principle of *Dougherty v. Sprinkle* remains to this day just as it was when the case was decided in 1888, notwithstanding the case of *Smaw v. Cohen,* in regard to the enforcement of liens and other cases relating

to the contracts of married women as free-traders. This Court has maintained and applied the doctrine as set forth in *Dougherty v. Sprinkle* in all its original force and efficacy. So late as 1895 it was affirmed by a unanimous decision in the case of *Wilcox v. Arnold*, 116 N. C., 708, the Court saying: "It (the contract) purports neither to charge her separate estate nor to be for her benefit, and if it had, the court of a justice of the peace would have had no jurisdiction in the matter," citing *Dougherty v. Sprinkle*. In the case of *Wilcox v. Arnold* the doctrine of this Court in such cases is fully declared, and *Pippen v. Wesson*, *Flaum v. Wallace* and *Farthing v. Shields* are cited with approval. In *Patterson v. Gooch*, 108 N. C., 503, this Court said: "The plaintiff contends that the statement set out in the record is, in effect, a written consent on the part of the husband, and the nature of the contract being such as necessarily to imply a charge upon the wife's personal estate, that the *feme* defendant is liable by virtue of The Code, sec. 1826. We need not decide how that may be, for if we concede that it is so, the remedy cannot be sought in a court of a justice of the peace." To the same effect is *Bank v. Howell*, 118 N. C., 271.

We have seen that no change has been made by legislation in the law as repeatedly stated by this Court, and it may safely be inferred that the Legislature has accepted our construction of the statute as the proper one and has acquiesced in it as being in accordance with what the law should be. It having been decided, as we have shown, and there being no expression to the contrary, that a married woman's engagement can only be enforced in equity against her separate estate, it necessarily follows that the jurisdiction in all such cases, except when otherwise expressly provided, must be in the Superior Court, without regard to the amount in controversy.

The payment of the note cannot be enforced in this case against the real property of the *feme* defendant, as there was

no privy examination. As to this part of the case the trial Judge was right. *Farthing v. Shields, supra.*

We hold, in conclusion, that the defendant Mrs. Johnson has sufficiently charged her separate personal estate with the payment of the note sued on, and that the Superior Court had the jurisdiction to enforce the charge. In this respect there was error in the judgment below. The judgment will be set aside and a new trial awarded.

Error.

CLARK, C. J., *dissenting in part.* I concur with the opinion that the bond sued on is a valid indebtedness against the *feme* defendant, and that the fact that her personal property may not exceed $500 cannot be set up as a defense, because the judgment against her will be enforced by an execution just as a judgment against any one else, and the personal property exemption must be claimed by her against the execution and not as a defense to the action. A married woman's contract no more creates a lien on her property, unless it includes a mortgage or a conveyance, than does a contract by any one else. *Bates v. Sultan,* 117 N. C., 100. The Code, sec. 1826, permits a married woman to make any contract for the payment of which her real or personal property shall be liable if made *with* the written consent of her husband, except in three instances there stated, in which she may contract *without* his consent. Section 1828 prescribes a method by which she can contract in all cases without her husband's assent, and section 1832 prescribes what conduct of her husband shall have the effect to authorize her to contract in all cases without his assent. *Cromer v. Marsha,* 122 N. C., 563; *Levi v. Marsha,* 122 N. C., 565, in which cases judgment before a justice of the peace was sustained. Here the contract is for money borrowed with the assent of the husband. The action is for a plain judgment to recover $170.63 and nothing more. Always

and everywhere *semper ubique,* an action on contract to recover money loaned is at law. The Constitution says all actions on contract, where the sum is less than $200, shall be brought before a justice of the peace, and abolishes the distinction between law and equity as a question of jurisdiction. In *Dougherty v. Sprinkle,* 88 N. C., 300, where the plaintiff sued a married woman to recover less than $200 for work done on her premises, it is true the Court held that the justice did not have jurisdiction, but the General Assembly has since enacted (1901, ch. 617) that when a building is built or repaired on a married woman's land "with her consent or procurement * * * she shall be deemed to have *contracted* for such improvements." The statute making it a contract, whether express or implied, this Court held that the married woman (if the amount was under $200) must be sued before a justice of the peace. *Finger v. Hunter,* 130 N. C., 532. If the case of *Dougherty v. Sprinkle* were now before the Court, by virtue of the act of 1901 and the last decision of this Court, it would necessarily be held that Dougherty was entitled to his judgment before a justice of the peace, for the facts in *Finger v. Hunter* are exactly the same. With the statutory repeal of *Dougherty v. Sprinkle,* all cases built upon it disappear with it. The act was passed to change the law. The Legislature could do no more than it has done. If it had enacted that in such case a justice of the peace should (or should not) have jurisdiction, it could not confer or refuse jurisdiction, but when the Legislature said that a married woman could make such "contract" the Constitution fixed the jurisdiction in the justice of the peace when the amount is less than $200. It is so held in *Finger v. Hunter, supra.*

If a married woman is liable to a judgment less than $200 before a justice of the peace on an implied contract, under the act of 1901, the jurisdiction is necessarily the same upon

an express contract which is made as authorized by The Code, section 1826. *Dougherty v. Sprinkle* lays down the broad principle, top of page 302; "At law a *feme covert* is incapable of making any contract of any sort." That is the key to it. But the Legislature authorized married women to make contracts (The Code, sec. 1828), and judgments on such contracts against them before a justice of the peace have always been held valid. It authorized contracts by them under section 1832, and it has always been held that justices of the peace could give judgments against them upon contracts thereunder, if for less than $200. The act of 1901, ch. 617, validated contracts, express or implied, by married women for repairs or buildings on their land, and this Court held that in such judgment for less than $200 must be given by a justice of the peace. This contract is equally authorized by section 1826. *Dougherty v. Sprinkle* was wrong in its premises, for nothing in the Constitution prohibits the Legislature from authorizing married women to contract, and this Court has recommended that it confer such authority without restriction (*Bank v. Howell,* 118 N. C., 273), and the General Assembly *has* authorized married women to contract, sometimes requiring the husband's assent and sometimes not, but a contract authorized by statute is necessarily at law. Here there is no equity to assert. There is no lien to foreclose, but merely a valid contract (to pay money borrowed) binding on her. The Court so holds in this case. The money was loaned to her and she is the real debtor, as evidenced by her bond with her husband's written assent. If she were sued on an ante-nuptial contract for $170.63 (the amount in this case), the justice of the peace would have jurisdiction; *Neville v. Pope,* 95 N. C., 346; *Hodges v. Hill,* 105 N. C., 130; and even when part of the services or goods were obtained after marriage. *Beville v. Cox,* 107 N. C., 175; 11 L. R. A., 274. She can sue alone for tort; *Strother v. Rail-*

road, 123 N. C., 197; or for breach of contract; *Shular v. Milsaps*, 71 N. C., 297; and therefore can make an enforcible contract.

Here the contract, unlike that in *Dougherty v. Sprinkle*, is held valid by the Court. The statute (The Code, sec. 178) provides that a married woman may be sued. The Code, sec. 1826, authorizes her to make this contract, and it is held a valid contract. The Constitution says actions on contracts less than $200 are within the jurisdiction of a justice of the peace. The Constitution makes no exception. We have no right to create an exception. As *Daniel, J.*, well says: "Judges cannot be wiser than the law." Even if we could write such exception to the jurisdiction of justices of the peace into the Constitution, what benefit can accrue therefrom? Why not follow the Constitution?

In a less polite age the Judges held that a husband had a right to chastise his wife, and that while a single woman (if of age) was competent to manage her own business, she suddenly became incompetent and *non sui juris* upon marriage, and as suddenly resumed her intelligence again upon becoming a widow. The Constitution of 1868 did away with this inexplicable and unaccountable condition of things by expressly making married women *sui juris*, without any restriction on their property rights save requiring the husband's assent to conveyances by them. Some Judges, under the influence of preconceived ideas as to the universal incompetence of married women, failed to give effect to this ordinance of emancipation as to them, by reason of which, and some others subsequently, many decisions as to married women in this State are in conflict with each other and in flat contradiction to the Constitution. The resultant confusion is set out in *Vann v. Edwards*, 128 N. C., 431-434, in a summary of the decisons by Professor Mordecai in three pages of fine, closely-printed type. There is no better time to return to the plain

letter of the Constitution, which it is our duty to follow, than now. The old Judge-made law, that a husband had a right to chastise his wife, was reiterated by this Court again and again, till at last *Settle J.*, in *State v. Oliver*, 70 N. C., 60, exploded the fiction that the wife as to her person was assimilated to the condition of a child, *non sui juris*, and subject to chastisement as such, by saying, "the Courts have advanced from that barbarism." See 128 N. C., 428. In like manner the Constitution of 1868 repealed the former ruling of the Courts that as to her property rights a married woman was assimilated to the condition of a child, *non sui juris*, by providing as to her property she could "remain as if unmarried" save that as to her conveyances the assent of the husband should still be necessary.

In England and all her colonies and in nearly every State of this Union, by statute or constitutional provision, the emancipation of married women has been decreed, and in many instances even without the single restriction imposed by our Constitution. In this State alone have the decisions of the Courts failed to be in accord with such action of the law-making power. In this case the contract sued on having been held valid, the Constitution fixed the jurisdiction in the justice of the peace, and in my judgment this action brought in the Superior Court for the recovery of $170.63 was properly dismissed by the Judge below, though not for the reason he gave. The jurisdiction to recover upon this bond is held to be in the justice of the peace as to the co-obligors. There is nothing in the Constitution or statute which indicates that recovery upon a valid obligation of the *feme* defendant is not enforcible in the same jurisdiction. *Neville v. Pope* and *Finger v. Hunter, supra.* There is no reason that when a married woman borrows ten dollars for her own use she should be suable only in the Superior Court, with the increased costs and delay, while if the husband borrows $200, recovery can

be had before a justice of the peace. He is a party defendant in both actions.

No statute, with the utmost research, has yet been found which authorizes or suggests the "charging" of a wife's property for her contracts. As "it is our duty to construe or expound the law and not to make it," we should not continue a ruling which besides has been expressly overruled. In *Brinkley v. Ballance,* 126 N. C., 396, the Court held (*Faircloth, C. J.*, alone dissenting) as follows: "An examination of the Constitution, Article X, section 6, and of the statute, The Code, section 1826, shows no foundation for the 'charging' of the wife's property, as laid down in some decisions of a former Court. The Constitution requires only the written assent of the husband to 'conveyances,' and section 1826 requires only the written consent of the husband to contracts affecting the wife's 'real or personal' estate in certain cases, dispensing with it in others."

The Code, section 178, authorizes a married woman to be sued; Laws 1899, ch. 78, take her out of the class of those *non sui juris* (who are enumerated in The Code, sections 148 and 163, and nowhere else), and permits the running of the statute of limitations against her; and The Code, section 443, directs that execution issue against a married woman. The provision that it shall be levied only upon her separate property can have no effect other than to exempt what she holds *ex jure mariti, i. e.,* her contingent right of dower. There is nothing else to which the restriction could possibly apply. As a married woman can by the Constitution use her property "as if unmarried," save that the husband's written consent is required to her "conveyances" only; as by The Code, sections 1826, 1828 and 1832, she can contract as if unmarried, except that in some cases, mentioned in section 1826, the husband's written consent is required (nothing more); as by The Code, section 178, she can sue without join-

ing her husband and she can be sued without joining a next friend, and by section 443 execution can be levied on all the property she owns (with the same exemptions allowed men or *femes sole*); as further by Laws 1899, ch. 78, the statute of limitations runs against her as if unmarried, and by Laws 1901, ch. 617, she can be held liable in an action before a justice of the peace on an implied contract, it is difficult to see upon what principle she can be held a ward in equity and that the doctrine of "charging" her estate can be revived without there being now, or there having ever been at any time, a statute authorizing the doctrine of "charging," and after it has been overruled in *Brinkley v. Ballance, supra.*

MAKELY v. AMERICAN LEGION OF HONOR.

(Filed November 10, 1903.)

1. INSURANCE—*Contracts—Policy—By-Laws.*

A mutual life insurance association cannot by changing its by-laws lessen the value of a policy by reducing the amount of indemnity.

2. INSURANCE—*Contracts—Premiums.*

The holder of a policy of insurance which has been illegally reduced by the company is entitled to sue for the premiums paid and the interest thereon.

3. INSURANCE—*Contracts—Waiver—Premiums.*

The holder of a policy of insurance does not waive the right to sue for the premiums paid on the policy by paying premiums on the amount to which such policy had been illegally reduced if he objected to the reduction.

4. INSURANCE—*Contracts—Policy.*

Where a policy of insurance provides that the company will, upon death of the insured, pay not exceeding $5,000, and it receives premiums on the full amount, the policy is in legal effect for $5,000.

ACTION by M. Makely and wife against the Supreme Council American Legion of Honor, heard by Judge *Fred. Moore* and a jury, at Fall Term, 1902, of the Superior Court of CHOWAN County. From a judgment for the plaintiff the defendant appealed.

Pruden & Pruden and *Shepherd & Shepherd,* for the plaintiffs.

W. M. Bond and *J. W. Hinsdale & Son,* for the defendant.

DOUGLAS, J. This is an action to recover the proportionate amount of certain premiums paid on a life insurance policy, or "benefit certificate," as it appears to be called in the nomenclature of the association, upon a reduction of the face value of the policy. On 15 August, 1883, the defendant association issued to the plaintiff Metrah Makely a benefit certificate in the nature of a life policy, promising to pay to the wife of said Makely at his death a sum not exceeding $5,000. The insured paid all premiums and assessments up to September, 1900, when, without any default or consent on his part or the beneficiary of the policy, the face value thereof was reduced from $5,000 to $2,000, with a corresponding reduction in the amount of the premium. The plaintiff, referring to the insured, testified as follows, without contradiction: "I was insured August 15, 1883; was insured before this; exchanged first policy for this one. I paid all premiums up to September, 1900. After that date I sent premiums to Newman, treasurer of Council, but they were returned. They sent back three-fifths and kept two-fifths of premiums. I did not

agree to this. I wanted to keep up my insurance for $5,000. Finally I wrote them as they would not receive full amount of premium there was no use for me to continue to send full amount; sent full premiums for year after the change; told treasurer, Newman, I objected to my insurance being cut down. I did not acquiesce in my insurance being cut down to $2,000; I protested against it. I afterwards agreed to pay two-fifths of premium. No complaint has ever been made of my failing to keep other agreements referred to in the application. To January, 1902, I paid $3,006.40, not including interest. Including interest to January 1, 1902, have paid $4,231.46. Application dated August 9, 1881. No notice was given me that they were going to make change referred to in by-law before change was made. There was no friction between me and defendant until by-law was changed. I paid all the premiums. Sometimes had to pay one, sometimes two, and sometimes three premiums per month. A check dated December 28, 1900, was for the full amount of premium, and was returned. I paid full amounts all along as they became due; think checks were not sent back to me right away. Can't tell when check was first returned to me. I commenced sending two-fifths of original amount, and have kept it up to present. I am still a member, and have recently paid two-fifths of original premium; have kept it (two-fifths) up. I am, I suppose, still insured for two thousand dollars. I am still holding policy. Am suing for damages for destroying policy. We didn't expect damages for more than three-fifths; I claim damages for three-fifths of policy." *Re-direct examination:* "I paid the two-fifths under protest, because they would not receive the whole amount; protested when I sent two-fifths amount. Paid since September, 1900, $470."

The defendant offered very little testimony, the greater part of which was properly excluded as irrelevant. What was admitted raised no material issue of fact. Practically the

case is before us on questions of law, which we think have been substantially decided in the following cases: *Straus v. Life Asso'n,* 126 N. C., 971; 54 L. R. A., 605; 83 Am. St. Rep., 699; same case on rehearing, 128 N. C., 465; *Hill v. Life Asso'n,* 126 N. C., 977; *Simmons v. Life Asso'n,* 128 N. C., 469. With one exception, the principles governing the case at bar are so nearly identical and have been so fully discussed in those cases that it seems useless for us either to repeat or enlarge upon what we have said. We must adhere to what may now be considered the settled ruling of this Court, that "Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights." While relying upon our own decided cases, we are not without authorities in well-considered cases of other jurisdictions. Kerr on Insurance, 127; Niblack Benefit Societies, 58; *Ebert v. Mutual Res. Asso'n,* 81 Minn., 116; *Getz v. Am. Legion of Honor,* 109 Fed. Rep., 261; *Newhall v. Legion of Honor,* 181 Mass., 111; *Knights Templar v. Jarman,* 104 Fed. Rep., 638. In the last-mentioned case it was held by the Circuit Court of Appeals that "A clause in an application for a policy of life insurance in a mutual assessment company, that the applicant agrees, if accepted, 'to abide by the constitution, rules and regulations of the company as they now are or may be constitutionally changed hereafter,' cannot be reasonably construed as giving his assent in advance to any change which the company may see fit to make in its constitution or laws in the future which materially lessens the value of his policy by reducing the amount of indemnity which by its terms they promised to pay, nor will it have the effect of rendering such action binding upon him or the beneficiary in his policy."

The defendant has filed with us a copy of a recent opinion of the Court of Appeals of New York, 66 N. E., 932,

delivered April 7, 1903, in the case of Langan against this defendant, in which it is held that the plaintiff cannot recover damages. That case is interesting and important, from its application to that at bar, being against the same defendant and involving an identical cause of action. The Court there holds, as we do, that the amount of the policy cannot be reduced without the consent of the insured, who by his protest and tender of premium had preserved all his rights. The only difference is as to the remedy to which the plaintiff is entitled. Among other things, the Court says: "The obligation of the defendant under its contract, as evidenced by the benefit certificate, was to pay to the wife of the holder a sum not exceeding $5,000 upon the event of his death. Until that event occurred that contract continued, unless and until it was avoided by some act of the plaintiff. The action of the defendant, in the attempted amendment of the by-law, which was in force when the plaintiff joined the association and received his certificate, was wholly ineffectual to deprive him of any rights which had become vested. It was beyond the power of the defendant to affect the obligation expressed in the certificate without the consent of its holder. *Weber v. Supreme Tent of K. of M.*, 172 N. Y., 490; 92 Am. St. Rep., 753. It therefore remained unaltered and unimpaired. Its enactment constituted no breach of the contract. Upon its promulgation, however, the plaintiff had two courses open to him. He could notify the defendant that he refused to assent to its action, and could tender to it the assessments upon the basis of an insurance of $5,000. He did so, and notified it that he would keep the tender of payment of all assessments, legally called in the future, good. In that situation he might remain quiescent and the contract of insurance would mature upon his death in favor of his wife, the beneficiary named. The contract, in that case, with the insured performing all

the conditions required of him during his life, would have been perfectly good.

"But he was not obliged to remain thus quiescent and to incur apprehended risks which might present themselves to his mind as possibly consequent upon the illegal act of the defendant. He was fairly and justly entitled to know his rights and to have such protection against the apprehended consequences as the courts might afford him. He could invoke the exercise of the power of a court of equity to protect his rights by compelling the defendant to receive his assessments upon a basis of an insurance of $5,000 and to recognize the contract as in force. With just grounds to fear the consequences of the illegal corporate act, he could demand the issuance of a writ of prevention to accomplish the ends of precautionary justice by restraining the defendant from carrying out the amended by-law."

It appears that three of the seven judges dissented in this case without, however, giving any reason therefor. As they dissented from the judgment, it would seem that they must concur in the opinion that the defendant could not legally reduce the amount of its policy, and dissented only from that part of the opinion holding that the plaintiff could not recover in damages; otherwise they would have concurred in the result. With the highest respect for that able Court, we cannot concur in the opinion that the plaintiff cannot recover his premiums because the contract is still enforcible. We do not think the plaintiff should be denied his only practicable remedy simply because the action of the defendant is unlawful and void. In view of the persistence of the defendant in pursuing its arbitrary and unlawful course, it would seem a denial of substantial justice to require the insured to bequeath to his wife a law-suit for the support of her declining years, or to force him back into a hostile association where he would have no effective means of protecting his rights. We think it but

just to say to the defendant "You have refused to recognize your legal obligations to the insured; now pay back the money you have received as the consideration for your requdiated contract."

There are two contentions strenuously urged by the defendant in its oral argument and elaborate brief which remain to be considered. It insists that the policy did not stipulate to pay the fixed sum of $5,000 upon the death of the insured, but only agreed to pay some indefinite sum *not exceeding* that amount. If this contention were correct and carried to its legitimate conclusion it would enable the defendant to meet its obligations upon its own terms and thus defeat the essential elements of a contract. Such a construction would doubtless insure the continued existence of the association in a prosperous condition, but it contains no element of reciprocity, and we cannot suppose that it was ever contemplated by the plaintiff. For seventeen years the defendant continued to receive from the plaintiff the full premium based upon a policy for $5,000, and when it reduced the face of the policy to $2,000 it reduced the premium in proportion. Under such circumstances we must hold that the benefit certificate was in legal effect an insurance policy for $5,000. Again, it is contended by the defendant that the plaintiff accepted the reduction in the amount of his policy by continuing to pay the reduced premium, and that he thereby waived all right of recovery for breach of the original contract. We do not think so. There is certainly no evidence of an intentional waiver, and there are no facts demanding a constructive waiver in the face of the repeated tender and protest on the part of the plaintiff. The plaintiff protested against the reduction of his policy and continued for a year to pay to the defendant the full amount of his original premium or assessment, three-fifths of which was always returned. Finding it was useless to continue this method of procedure, he

again protested against the reduction of his policy, continued to pay the reduced premium, and brought suit to recover the three-fifths of his back premiums paid upon the repudiated portion of his policy. He received nothing from the defendant in consideration of any implied waiver. The defendant did not pay him any money, nor did it give him any additional benefit or security. It simply repudiated three-fifths of its contract of insurance. It is true it reduced its premium in proportion, but it did not repay or offer to repay any part of the premiums already paid on the full amount of the policy. If it can do that, why can it not still further reduce the value of the policy to $500 or even to any nominal sum? Any such construction would defeat the essential objects of insurance, and cannot be supposed to have been *bona fide* in the original contemplation of either party to the transaction. There are other exceptions of the defendant, but none of them can be sustained under the decisions of this Court.

The judgment is

Affirmed.

HOPPER v. SOUTHERN EXPRESS COMPANY.

(Filed November 17, 1903.)

FELLOW-SERVANT—*Master and Servant—Express Company—Railroads—Personal Injuries.*

A person employed by a railroad company to load express hauled by the railroad company for the express company is not a fellow-servant of an employee of the express company.

ACTION by M. F. Hopper against the Southern Express Company, heard by Judge *Walter H. Neal* at March Term, 1903, of the Superior Court of FORSYTH County. From a judgment for the plaintiff the defendant appealed.

Lindsay Patterson, for the plaintiff.
Watson, Buxton & Watson, for the defendant.

MONTGOMERY, J. This action was brought to recover damages against the defendant on account of a personal injury inflicted upon the plaintiff by the negligence of an employee of the defendant company. The only question for our decision is that of fellow-servant, arising upon the ruling of his Honor that upon the evidence the plaintiff and the employee of the defendant were not fellow-servants. The undisputed evidence was to the effect that the plaintiff was employed by R. P. Kerner, who was a local agent of the Southern Railway Company at Kernersville, N. C., and also the agent of the defendant company at the same place to do the work of a station hand; that the plaintiff was told when he was employed that he would have to handle freight, express matter, baggage, and pump water, etc.; that Kerner paid the plaintiff his wages in checks on the Southern Railway Company, and that the plaintiff never received any pay from the defendant. Kerner, as a witness for the defendant, testified: "I was paid

a monthly salary as railroad agent, and as express agent I received a percentage of the receipts. Hopper was paid by the Southern Railway Company fifty-five cents per day. He received no part of the express receipts. The express company pays the railroad company for hauling its stuff; pays according to tonnage and mileage. The contract between the railway company and the express company was: at a station like Kernersville the railroad must furnish all necessary help to handle the express stuff in consideration of the payment it received for the mileage and tonnage—that is, to handle the express at the station, to take it on and off the cars." There was no error in the ruling of his Honor. In no view of the evidence was the plaintiff the servant of the defendant company. There was no contract between them, and the plaintiff neither looked to the defendant company for his wages, nor did he receive any pay from it. All the evidence tends to show that he was employed by the Southern Railway Company as a station hand and was paid for his services by that company; and at the time the plaintiff was injured by the negligence of the defendant he was rendering service to the defendant, not as its servant and hired man, but as the paid servant of the Southern Railway Company under a contract between the railway company and the express company concerning that very work. The plaintiff, then, being in the employment of the Southern Railway Company, cannot be a fellow-servant with the employee of the defendant, for the rule of law which furnishes exemption to a master from liability to one servant for the negligence of another necessarily embraces the proposition that the servants are in the employment or at least under the control of the same master. It is needless to cite decisions on this point. The reason of the rule is apparent. The exemption of the employer is founded upon the assumption by the servant of the risks naturally incident to the work in which he is employed, including that

of the negligent conduct of his fellow-servant in performing duties which the employer is not expected to discharge personally. There is no reason, then, why any other person should be exempted from the results of the negligence of his servants simply because the injured person is also an employee who in the course of his employment is compelled to come in contact with the servants of such other person. 12 Am. & Eng. Enc. of Law, 993.

Our attention on the argument here was called to the case of *San An. R. Co. v. Taylor* (Tex. Civ. App.), 35 S. W. Rep., 855, by the counsel of the appellant as an authority in its favor, but upon a careful examination of the facts in that case it appears that there was a community of interest and common arrangement between the railroad company and the express company for the handling and storing of express matter and baggage by them at the station where the plaintiff was employed. No such facts existed in the case before us, and if the facts were the same there as in our case we would not be disposed to follow the decision.

The doctrine of different department limitations is not involved in this case. The business of the express company was an entirely separate business from that of the railway, and the plaintiff had no connection with the express company except as the servant of the railway company, and that, too, under a contract between the two companies.

No error.

EVANS v. ALRIDGE.

(Filed November 17, 1903.)

1. ATTACHMENT — *Levy—Judgments—Non-residents—The Code, sec. 359—Acts 1895, ch. 435.*

The failure to certify to the clerk of the superior court of the county in which the land lies a levy thereon, in an attachment proceeding, does not invalidate such levy.

2. EXECUTIONS—*Judgments—Levy.*

A levy on land located in another county than that in which the judgment was obtained may be made without docketing a transcript of the judgment in the county where the land lies.

3. ATTACHMENT—*Judgments—Summons—Publication—Sale.*

In an action to recover land purchased under a judgment recovered against defendant's non-resident grantor, plaintiff could not recover, in the absence of proof of the grantor's personal appearance or publication of summons after attachment.

4. NON-SUIT—*Attachment.*

Where a non-suit is taken upon a demurrer to the evidence, a new action may be brought within one year.

ACTION by J. J. Evans against J. M. Alridge, heard by Judge *W. R. Allen* and a jury at July Term, 1903, of the Superior Court of RANDOLPH County. From a judgment for the defendant the plaintiff appealed.

O. L. Sapp, for the plaintiff.
Brittain & Gregson, for the defendant.

CLARK, C. J. The plaintiff instituted an action in Robeson County, 27 September, 1897, against one Jennings, a non-resident of the State, and, presumably as a basis for publication of summons, procured a warrant of attachment, which

was levied in Randolph County upon the land in controversy as the property of Jennings, 20 October, 1897. Judgment was rendered in that action, the defendant entering no appearance, 6 December, 1898. On 18 July, 1899, execution issued to Randolph County and was levied 16 August, 1899, on the land in controversy, which was the same on which the warrant of attachment had been levied, and on 2 October, 1899, the land was sold under said execution and levy and was purchased by the plaintiff. The defendant claims title by virtue of a conveyance from J. D. Jennings executed to him 28 August, 1889 (twelve days after the levy of the execution under which the plaintiff bought), which deed was recorded 29 August, 1899.

The defendant demurred to the evidence:

1. Because it did not appear that the levy of the attachment was certified to the Clerk of the Superior Court of Randolph County, where the land lay, as required by chapter 435, Laws 1895; Clark's Code (3d Ed.), sec. 359. But that merely prescribes that the levy of the attachment shall be a lien only from the date of the entry of said certificate by the Clerk. Failure to make such certificate and entry in no wise invalidates the efficiency of such levy as the basis of jurisdiction against the defendant in the action.

2. That the execution was issued from Robeson County and levied without a transcript of the judgment being docketed in Randolph. That question was passed upon in *Lytle v. Lytle,* 94 N. C., 683, where an execution issued from McDowell to Buncombe County was levied on realty in the latter county without a transcript of the judgment being docketed therein, and this Court held (*Smith, C. J.,* writing the opinion) that "if an execution issued on a judgment more than ten years after the docketing, but which is not dormant, or to a county in which the judgment has never been docketed, a sale of both real and personal property under it is valid, but

the lien only relates to the levy." This case was cited and approved in *Bernhardt v. Brown,* 122 N. C., at p. 594; 65 Am. St. Rep., 725, which case cites as holding the same doctrine *Sawyers v. Sawyers,* 93 N. C., bottom of p. 321; *Spicer v. Gambill,* 93 N. C., 378; *Coates v. Wilkes,* 94 N. C., at p. 181; *Holman v. Miller,* 103 N. C., 118. *Lytle v. Lytle* and *Spicer v. Gambill* are cited as authorities in *Heyer v. Rivenbark,* 128 N. C., 272. The reason is that a levy is a taking possession by the sheriff and is a notice to all the world.

For a third ground the defendant objects that the transcript of the record from Robeson in the action of *Evans v. Jennings,* put in evidence by the plaintiff, does not show any personal appearance by Jennings nor publication of summons. This point is well taken. The plaintiff, purchaser at the execution sale, having been plaintiff in the action in which the execution issued, must not only show execution, as a purchaser who is a stranger to the action might do, but must show that there was a valid judgment. *Lyerly v. Wheeler,* 33 N. C., 288; 53 Am. Dec., 414; *Jennings v. Stafford,* 23 N. C., 404; *Stallings v. Gully,* 48 N. C., 344. The cases cited by the plaintiff's counsel, where the defendant is presumed to have appeared because of continuances of the cause, were cases where the continuances had been procured by the defendant. 2 Enc. Pl. & Pr., 633.

As the plaintiff failed to show that there was due publication of summons as well as an attachment, the Court properly dismissed the action under the statute. *Spillman v. Williams,* 91 N. C., 483; *Winfree v. Bagley,* 102 N. C., 515. If however, in fact there was proper publication, nothing debars the plaintiff from bringing another action in which it may be shown. *Prevatt v. Harrelson,* 132 N. C., 250, and cases there cited.

No error.

TURNER v. THRESHING MACHINE CO.

(Filed November 17, 1903.)

1. JUDGMENTS—*Excusable Neglect—Findings of Court.*

On a motion to set aside a judgment, if the court finds the movant guilty of inexcusable neglect, it need not find whether the defendant had a meritorious defense.

2. JUDGMENTS—*Setting Aside—Justices of the Peace—Findings of Court—Superior Court.*

On appeal to the superior court from an order of a justice denying a motion to open a default judgment, the court may disregard the justice's finding of fact and hear the matter anew.

3. JUDGMENTS—*Attachment—Publication—Foreign Corporation—Notice.*

A non-resident corporation, against which a default judgment was obtained after service by publication, is not entitled to have the default judgment opened on the ground that it had no notice of the pendency of the suit unless it shows that it exercised due diligence.

ACTION by W. E. Turner & Son against J. I. Case Threshing Machine Company, heard by Judge *T. A. McNeill* at May Term, 1903, of the Superior Court of IREDELL County. From a judgment for the plaintiff the defendant appealed.

Armfield & Turner, for the plaintiff.
Furches, Coble & Nicholson, for the defendant.

WALKER, J. This is an action which was brought by the plaintiff before a justice of the peace on the 19th day of August, 1902, to recover from the defendant the sum of $154.40 due by account for commissions on sales of machinery alleged to have been made by the plaintiff for the defendant as its agent. The defendant, being a non-resident, was

brought into court by publication, and was required to appear and answer the complaint on the 20th day of September, 1902. A warrant of attachment was issued and levied upon a note due by D. A. Morrison to the defendant. On the return day of the summons, which was served by publication, the defendant company failing to appear and answer, judgment by default was entered by the justice of the peace, and the proceeds of the note attached were applied to its satisfaction. There was no dispute as to the regularity of the publication of the summons and the service of the warrant of attachment. The defendant filed a petition in the case, which was verified on the 13th day of January, 1903, and in which it alleged that it had never been served with process except by publication; that it had no actual notice of the action until after the rendition of the judgment; that it was not indebted to the plaintiff for commissions on sales, as alleged by him, and that it had a meritorious defense to the action. The defendant then prayed that the case be re-opened and that it be allowed to defend. Affidavits were filed by the plaintiff controverting the allegations of the defendant's petition, and upon the petition and affidavits the justice of the peace found the facts, one of those findings being "(4) that said defendant had actual notice of the pendency of said suit, its nature and the time and place of trial ten days or two weeks before the same was tried, and could have been present and made its defense, if any it had." Upon his findings the justice denied the defendant's motion to re-open the case, and the defendant appealed to the Superior Court. In the latter Court the judge found the following facts:

"1. That the defendant is a corporation created under the laws of Wisconsin, doing business at Racine in said State.

"2. That a judgment was rendered in this action in favor of the plaintiffs against the defendant before W. C. Mills, J. P., for $154.40 and costs, on the 20th September, 1902,

upon the cause of action set out in the record; that attachment proceedings were regularly taken in the action, and such proceedings were had thereon as that a note due the defendant by one D. A. Morrison was attached and the proceeds applied to the satisfaction of said judgment of September 20, 1902, as appears in the record.

"3. That on the trial before the justice of the peace the plaintiffs were examined on oath as witnesses in respect to the validity of their cause of action.

"4. That on July 30, 1902, a letter was written by the plaintiffs' attorneys to the defendant, a copy of which, marked 'Exhibit A,' is hereto attached and made a part of this finding.

"5. That O. C. Clingman was one of the defendant's agents, and had notice of the institution and pendency of the action in which the judgment of September 20, 1902, was rendered, some ten days before judgment was rendered.

"6. That on the return day of the writ the case was tried and the defendant was not present, nor was it represented by an attorney or agent on the hearing.

"7. That except by virtue of the attachment proceedings and the connection of O. C. Clingman with the institution of the suit before the judgment of September 20, 1902, the defendant had no actual notice of the rendition of the judgment on September 20, 1902, until after the D. A. Morrison note and indebtedness had been subjected to the execution issuing on the said judgment."

On the foregoing facts, and upon a consideration thereof, the Court adjudged that the defendant had failed to show good cause for setting aside the judgment complained of, and its motion was denied. The defendant excepted to this ruling on the following grounds: 1. That the Court refused to re-open the case on the facts found. 2. That the Court erred

in failing to find that the defendant had a valid and meritorious defense to the action.

While it would have been better, perhaps, for the Court to have found as one of the facts whether or not the defendant had a valid and meritorious defense to the action in order to make the findings of fact complete, yet we do not think that the failure to find as to that fact is fatal to the ruling of the Court below. It can make no difference how good or meritorious a defense a party who seeks to set aside a judgment may have if he has been guilty of such laches as will defeat his application for the relief demanded. It does not become very material to inquire as to the validity of the defense until it has first been determined whether the defendant has made out a case entitling it to have the judgment vacated in order that it may be let in to defend the suit. A defense absolutely perfect and impregnable would be of no avail if it could not be pleaded, and this cannot be done until the defendant shall have shown that it has been free from negligence and that the right to defend has not been lost by its fault, or, in other words, until it has shown good cause for setting aside the judgment.

In the case of *Ins. Co. v. Rodecker,* 47 Iowa, 162, a similar question was presented, and the Court held that when a petition is filed to vacate a judgment the Court may first determine whether the grounds upon which the petition is based are sufficient before inquiring into the validity of the defense, although the judgment cannot be vacated until there is shown to be a valid defense to the action. This, in our opinion, accords with the true principle which should govern in such cases. *Edwards v. Jamesville,* 14 Wis., 26. We have discussed this exception more at length than we would otherwise have done, because much of the able argument of the defendant's counsel was directed to it.

As to the other exception that the Court refused to vacate

the judgment, it appears that the justice found certain facts, and, among others, that the defendant had actual notice of the suit in time to have appeared and defended it. Upon this finding he entered an order denying the motion, from which the defendant appealed to the Superior Court. This finding of fact by the justice we cannot, under the decisions of this Court, consider, as the judge whose judgment we now have under review did not accept and act upon those findings, but heard the motion *de novo* and found the facts himself, and upon the facts thus found by him based the judgment of the Court from which this appeal was taken. The judge had the right to disregard the justice's findings of fact and to proceed to hear the matter anew. This seems to be the settled practice. *Finlayson v. Accident Co.*, 109 N. C., 196; *In re Deaton*, 105 N. C., 59; *King v. Railroad*, 112 N. C., 318. In Deaton's case the reasons for the adoption of this practice are fully stated.

The finding of the justice that the defendant had actual notice would certainly justify his order and the judgment of the Superior Court, if we were at liberty to consider it, but we must confine ourselves to the facts stated by the judge. He finds that nearly two weeks before the judgment was entered by the justice the defendant was notified by a letter from the plaintiffs' attorneys of the claim, and furnished with an itemized statement of it, and that in the letter demand for immediate payment was made, which demand was coupled with a notice that if payment was not made at once the money would be collected by legal process, and that at least ten days before the rendition of the judgment one of the defendants' agents had received actual notice of the pendency of the suit for the recovery of the plaintiff's account. While it is found that notice of the suit was given to the defendant's agent, it does not appear in the findings of fact at all, and not anywhere in the case affirmatively, even if we were permitted to

consider the affidavits, that the defendant was not informed by its agent of the pendency of the suit. It would have been very easy to have met this allegation of the plaintiff that the agent had notice by his own affidavit or at least by an affidavit of the defendant denying specifically that it had received any communication on the subject from the agent. We think it can fairly be inferred from the failure of the defendant to show the contrary that it received information from its agent to the effect that the suit had been brought.

It is to be observed also that there is no finding in the case showing what answer, if any, was made by the defendant to the letter of the plaintiff's attorneys, and it does not appear that the defendant took any action whatever in regard thereto, or that it made any provision for the protection of its interests in the event that the suit, which had been threatened in no uncertain terms, was brought, although it had an agent at the place where the plaintiffs lived. The defendant does not seem to have made any inquiry after it received the letter as to whether the threat to sue had been executed, so far as the case shows, until January, 1903, nearly four months after the rendition of the judgment, although, as we have seen, it was put upon its guard by the letter and should have expected immediate action by the plaintiffs in the Court upon its refusal to pay their claim. Had the defendant shown clearly that it had no actual notice of the suit and that it had taken proper steps to have its interests looked after when it received the letter, and that the failure to appear and plead was not the result of any inattention on its part, a different case would have been presented; but under the circumstances it does not seem to us that the defendant has exercised due diligence. What does not appear is presumed not to exist. And this is especially true, when, as in our case the burden of showing the fact would acquit it of negligence is upon the defendant. In view of the contents of the letter from the

plaintiff's attorneys to the defendant, we think the defendant's long silence required explanation. There was no exception upon the ground that the Court failed to find as a fact that the defendant did not receive the letter from the attorneys, or that its agent had failed to notify it of what he had learned in regard to the suit. We must, therefore, conclude that there was no evidence to establish these facts.

There was no error in the ruling of the Court below.

No error.

ATWELL v. SHOOK.

(Filed November 17, 1903.)

1. ADVERSE POSSESSION — *Homestead—Allotment—Widow—Heirs —The Code, sec. 144.*

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them by adverse possession may be tacked to that of the husband.

2. ADVERSE POSSESSION—*Color of Title—Widow—Deeds.*

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession is immaterial.

3. APPEAL—*Exceptions and Objections—Instructions.*

An objection to a certain instruction on the ground that there was no evidence to support it cannot be reviewed, unless all of the evidence is contained in the record.

ACTION by J. D. Atwell against J. M. Shook, heard by Judge *W. R. Allen* and a jury, at August Term, 1903, of the

Superior Court of IREDELL County. From a judgment for the plaintiff the defendant appealed.

L. C. Caldwell and *H. P. Grier,* for the plaintiff.

Furches, Coble & Nicholson and *J. B. Connelly,* for the defendant.

CONNOR, J. This is an action for the recovery of real estate. The land in controversy is shown on the map, being the three-acre tract included within the boundaries set forth in the complaint, also a strip on the southern border of the 150-acre tract. It is admitted that the title is out of the State. The plaintiff claims title under a deed made on the 14th May, 1890, by W. M. Robbins, commissioner, pursuant to a decree made in a proceeding brought by the heirs of J. M. Harden for a sale for partition. Robbins conveyed the lands to the plaintiff and another. By mesne conveyances such title as his deed conveyed to the entire tract is now in the plaintiff. The plaintiff introduced a deed dated February 4, 1848, from Margaret G. Kirkpatrick to J. M. Harden for the 150-acre tract. He showed no paper title in J. M. Harden to the three-acre tract. J. M. Harden died in 1869. There was evidence tending to show that he had been in possession of the three-acre tract from 1853 or 1854 to the time of his death. In 1869, after the death of J. M. Harden, his widow, Mrs. M. A. Harden, applied for and had allotted to her the 150-acre tract and the three-acre tract as a homestead. In 1890 Mrs. Harden made a deed to J. M. Shook, the defendant, for the three-acre tract, including the land in controversy on the south border of the 150-acre tract. This deed was registered in 1901. The defendant introduced evidence tending to show that he went into possession of that part of the 150-acre tract in controversy in 1873 or 1874, and that he is still in possession thereof. He also introduced evidence

tending to show that he went into possession of the three-acre tract in 1890, and is still in possession thereof. The plaintiff introduced evidence tending to show that Mrs. M. A. Harden went into possession in 1869 and remained therein until her death, a year or two before this action was brought.

The Court instructed the jury in respect to the three-acre tract that the allotment of a homestead to Mrs. Harden did not confer title, and is only material in determining the nature and extent of her possession; that if her husband was in possession prior to his death and she continued his possession and made application for the allotment of a homestead in his land and the allotment was made, and she continued her possession, claiming the right to such possession under the allotment, her possession would not be adverse to the heirs of her husband or those claiming under them. To this instruction the defendant excepted.

The Court further charged the jury: "If you find by the greater weight of evidence that J. M. Harden was in possession of the three-acre tract prior to his death, claiming it as his own; that after his death Mrs. Harden continued in possession as his widow and applied for a homestead in his land and upon her application the three acres were allotted as a part of her homestead, and she continued in possession under the allotment, then her possession would not be adverse to the heirs of J. M. Harden, but would enure to their benefit and to the benefit of the plaintiff who claims under him; and if this possession was open and notorious and under claim of right for twenty years, then the plaintiff without deed would be the owner, and if you so find you will answer the first issue 'Yes.'" The defendant excepted.

The Court also charged the jury: "If you find by a greater weight of evidence that J. M. Harden was in possession of the three acres prior to his death, claiming it as his own; that after his death Mrs. Harden continued in possession as his

widow and applied for a homestead in his land; that upon her application the three acres were allotted as a part of her homestead, and she continued in possession under the allotment, then her possession would not be adverse to the heirs of J. M. Harden, but would enure to their benefit and to the benefit of the plaintiff who claims under him, and if this possession was open and notorious and under color of title for seven years, then the plaintiff would be the owner and you will answer the first issue 'Yes.'" The defendant excepted. The Court charged the jury that the deed from Robbins, commissioner, was color of title.

The defendant requested the Court to give the following special instructions: "That the assignment of a homestead conveys no title to the homesteader; it only protects the homesteader against execution creditors; and a homestead laid off on land not belonging to the homesteader, or covering land that did not belong to the homesteader, would give the homesteader no right of possession, nor would it prevent the rightful owner from recovering possession of such land at any time. If the homestead laid off to Mrs. Harden covered land that did not belong to her husband, it gave her no right to the possession of such land as her husband did not own, nor would such homestead be color of title to land not owned by Harden." The Court gave the following part of such instruction and refused to give the remainder: "That the assignment of a homestead conveys no title to the homesteader; it only protects the homesteader against execution creditors. Nor would such homestead be color of title to land not owned by Harden." The defendant excepted.

We concur with his Honor that the allotment of the homestead to Mrs. Harden conferred no title upon her, nor did it in any manner or any degree affect the question of title as against the defendant. The case, however, in respect to the three-acre tract does not turn or depend upon the allotment of

the homestead as affecting the title to the land. *Keener v. Goodson,* 89 N. C., 273; *Littlejohn v. Egerton,* 77 N. C., 379; *Joyner v. Sugg,* 132 N. C., 580. The charge, as construed by us, does not controvert this proposition. It is based upon the principle that if one goes into possession without color of title and remains therein, either by himself or those claiming under him, for twenty years, it thereby bars the entry of the true owner, unless under disability. The Code, sec. 144. J. M. Harden having entered into possession of the land in 1853 and remained continuously therein until his death in 1869, such possession being continued by his widow until her death, completes the twenty years required to bar the action. The defendant, however, insists that the possession of the widow under the homestead allotment does not enure to the benefit of the heirs, and that from the death of Harden to the death of his widow neither they nor any one claiming under them were in possession, and that therefore Harden's possession having continued only sixteen years the plaintiff, never having been in possession under his deed, is not entitled to maintain the action.

In *Alexander v. Gibbon,* 118 N. C., 796, 54 Am. St. Rep., 757, *Mr. Justice Furches* says: "The plaintiffs may establish their title in any way they might do, if this had originally been commenced as an action of ejectment. By showing an unbroken line of conveyances from the State to them or to Joseph M. Alexander, their father, and that he is dead, or by showing possession in Joseph M. Alexander and those under whom he claimed to the time of his death, and the possession of his heirs at law since his death, for a sufficient length of time to establish or to ripen their title into a perfect title." *Mobley v. Griffin,* 104 N. C., 112.

It is clear that the possession of the heir may be added to the possession of the ancestor to complete the twenty years which will bar the action. We do not understand this to be

controverted, but the defendant says that the possession of the widow was not the possession of the heirs, but was adverse to them. This is the point in the case. We agree with his Honor that the question is not whether the widow took any title by the allotment of the homestead, but whether she claimed under the heirs, thereby making her possession their possession. Certainly her possession could not be adverse to the heirs, and this is so without regard to the question, discussed before us, as to the effect of the allotment of the homestead. If instead of taking a homestead she had taken dower in her husband's land, and in the allotment the three acres to which he had no paper title were included therein, and she remained in possession, certainly such possession would enure to the benefit of the heirs, being an elongation of the husband's title or estate. This would not be upon the principle that she acquired any new or independent right by the allotment of the dower, but that she claimed under the husband and thereby her possession enured to the benefit of the heirs.

In *Williams v. Bennett*, 26 N. C., 122, *Ruffin, C. J.*, says: "The question then is whether the possession of the widow of the mortgagor is held under the mortgagee or adversely to him. Clearly, we think, it is the former, *whether she merely continues in possession after the death of the mortgagor, as his widow, or holds a part of the premises as dower assigned to her.* * * * The widow but continues the estate and possession of the husband, which he held under the mortgagee, and cannot therefore set up an estate in any other person. Neither can she set up title in herself by virtue of her possession as tenant in dower; for in its very nature it is but a continuation of the husband's estate, and is therefore affected by the estoppels which attached to it in the hands of her husband."

In *Buffalow v. Newsome*, 12 N. C., 208, 17 Am. Dec.,

565, *Henderson, J.*, says: "The widow is estopped by her husband's deed, for she is *tenant to the heir* who is estopped, and the tenant is always bound by an estoppel on his landlord when his title is derived after it arises. * * * Upon his death, the *widow succeeded to the possession*, accompanied by the estoppel, as she could not succeed to her husband's possession stripped of its incidents."

In *Nixon v. Williams*, 95 N. C., 103, *Merrimon, J.*, speaking of the possession of the widow after the death of her husband, says: "The widow, entitled to dower, remained upon the land after the death of her husband, and continued to do so for several years, but no dower was ever assigned to her. Her possession was not adverse to the wife of the plaintiff in her lifetime; indeed, she was in possession under her, and the defendant's presence did not have the effect to prevent the seizin of the plaintiff's wife, or his rights as the husband." The principle as deduced from this case is thus stated: "The possession of a widow, to whom no dower has been assigned, is not adverse to the heirs at law of her deceased husband."

In *Page v. Branch*, 97 N. C., 97, 2 Am. St. Rep., 281, it was shown that the widow remained in possession of the land, no dower having been allotted to her. His Honor charged the jury that such possession was not adverse to the heirs of her husband. The Court, through *Davis, J.*, says: "The charge of his Honor and the finding of the jury render it unnecessary for us to consider the character of Rebecca Branch's possession—it was not adverse," citing *Grandy v. Bailey*, 35 N. C., 221.

These authorities fully sustain the contention that the possession of the widow of J. M. Harden was not adverse to the heirs.

The case on appeal thus states the point in controversy: "As to the three-acre tract the question of law arose whether the possession of Mrs. Harden, under the homestead allot-

ment, enured to the benefit of the heirs of J. M. Harden, and through them to the plaintiff, so as to ripen the possession of J. M. Harden, who the evidence tended to show held possession from 1854 to the time of his death in 1869, into title by adverse possession for twenty years; or whether the possession of Mrs. Harden failed to be a continuance of the possession of J. M. Harden, and whether it therefore enured to the benefit of the defendant by reason of the plaintiff not being able to show title by possession, he having shown no paper title in himself, except such as his deed from Robbins, commissioner, as aforesaid, under a proceeding for partition, may have been." The question thus presented is whether the possession of the widow under the homestead allotment can be "tacked" to that of the husband, thereby making an adverse possession for twenty years available to the heir or his grantee. It is clear that if the heirs had, upon the death of J. M. Harden, taken possession and conveyed their interest to the plaintiff who had immediately gone into and remained in possession for a period which, "tacked" to the possession of Harden, completed the statutory period, he would, as against all persons not under disability, have acquired title in fee. Did the possession of the widow under the homestead work out the same result? For the purpose of "tacking possessions" it is essential that they must be continuous, and there must be some privity either of estate or possession between the successive occupants. Separate and unconnected disseizins cannot be "tacked," as each new disseizin makes a new period from which time must be counted. If the possession acquired by the disseizin be interrupted or broken, and the former adverse holder quits possession, the true owner is by virtue of his legal title instantly seized of the premises by operation of law. Privity denotes merely a succession of relationship by deed or other act, or by operation of law. I Cyc., 1002. It is held by the Supreme Court of

Massachusetts that there must be some privity *in estate* between the successive occupants; therefore the possession of the widow, no dower having been assigned, cannot be tacked to that of the husband. *Sawyer v. Kendall*, 10 Cush., 241. In Connecticut it is held that privity of estate is not necessary. "It is sufficient if there is an adverse possession, continued and uninterrupted for fifteen years, whether by one or more persons. Doubtless the possession must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them, but such continuity and connection may be effected by any conveyance, agreement or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact." *Smith v. Chapin*, 31 Conn., 530.

In *Crispin v. Hannoven*, 50 Mo., 536, it is said: "Not even a writing is necessary if it appear that the holding is continuous and under the first entry." In *McNeely v. Langdon*, 22 Ohio St., 32, the Court says: "The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer, but as respects the rights of third persons, against whom the possession is held adversely, it seems to us immaterial if successive transfers of possession were in fact made, whether such transfers were made by will, by deed, or by mere agreement, either written or verbal." In *Weber v. Anderson*, 73 Ill., 439, it is said: "When land is held adversely by different occupants the identity and continuity of their possession, in order to show a limitation, may be shown by parol evidence." "The test question as to whether the requisite privity exists between successive tenants is whether the occupation of the subsequent tenant is referrable to the same entry and under the same claim of right, as it is called, as that of the prior occupant. In other words, whether the occupation of the one constitutes but a con-

tinuation of the possession of the other." Sedgwick and Wait on Trial of Title, sec. 747. "In order to create the privity requisite to enable a subsequent occupant to "tack" to his possession that of a prior occupant, it is not necessary that there should be a conveyance in writing. It is sufficient if it is shown that the prior occupant transferred his possession to him even though by parol. * * * But in all cases the several occupants must be so connected that they can be referred to the original entry, and the continuity of the possession must be unbroken. * * * So, too, the successive occupants must claim through their original predecessors." Wood on Lim., 693. From these authorities it would seem that, assuming as his Honor did, the allotment of the homestead was invalid and conferred no right upon the widow, yet if she remained in possession under and by virtue thereof, she was not a new disseizor, but that such possession was a continuation of that of her husband and enured to the benefit of the heirs. This Court, in the several cases cited, having held that the possession of the widow, when no dower was assigned, was not adverse to the heir, we do not perceive how an invalid assignment of a homestead with the assent of the heir could render her possession thereunder adverse. If the heirs by parol had attempted to give her an estate for life, and had, pursuant thereto, put her in possession, such possession, as we have seen, would have been continuous and in privity with that of the heirs who claimed under their father. It is the taking and holding the possession under and by virtue of the original entry which constitutes the continuity and privity which the law requires. It has been expressly held by the Supreme Court of Kentucky in *Mills v. Bodley,* 4 T. B. Mon. (Ky.), 248, "that the possession of the widow enures to the benefit of the heirs, and, for the purpose of perfecting title in them, may be tacked to that of the husband; and this, because she cannot without the assent of

the heirs change the character of the possession." We concur in the instruction given by his Honor to the jury upon this question.

The defendant's third exception has given us more difficulty. The deed from Robbins, commissioner, is made "subject to the life-estate of Mrs. Harden, widow," hence it would seem that her possession, without color of title, could not be converted into possession under color of title because of the commissioner's deed, which conveyed the land subject to what was supposed to be her life-estate. The question is an interesting one, and no authorities are furnished us by counsel, nor have we been able to find any case directly in point. There seems to be no controversy or denial of the fact that J. M. Harden went into possession in 1853 or 1854 and so remained until his death, and it is admitted that his widow remained in possession under the homestead allotment until her death. Upon these facts it is clear that more than twenty years elapsed before the defendant took possession in 1890. It is therefore immaterial whether the deed from the commissioner to the defendant constituted color of title, or if so, whether it changed the character of the possession of the widow; hence, any error, if there be such, in the charge in regard to the seven years' possession under color would be harmless. The plaintiff had no right of entry under his deed until the death of the widow, and this would be true, notwithstanding the fact that the widow had no life-estate; as he took expressly subject to her right to remain on the land during her lifetime, claiming under the heirs, who recognized such right and conveyed expressly subject thereto, his right of possession was postponed until her death. There was no reversible error in the instruction given.

In regard to the tract lying on the southern border of the 150-acre tract, assuming that the jury found under the instruction of the Court the boundaries to be as contended for by

the plaintiff, the only question in controversy was whether the defendant had such adverse possession as barred the plaintiff's action. His Honor charged the jury with respect to this tract: "That if they found that the defendant entered into and took adverse possession in 1873 or 1874, and that he had been in continuous adverse possession of the same for twenty years, this would ripen his possession into a title, and they would answer the issue 'No.'" The Court further charged the jury: "That if they found that the boundaries are not located as the plaintiff contends, still if the jury find that the plaintiff and those under whom he claims have been in the adverse possession for twenty years under known and visible lines, then they will answer the third issue 'Yes.'" The defendant's exception to this charge is based upon the statement that there was no evidence of any possession of said land by the plaintiff or by any one whose possession enured to his benefit. The case on appeal, while not setting out the evidence in full, states that "the plaintiff also offered evidence tending to show that J. M. Harden during his lifetime was in possession of all of the land down to the black line, and that his widow, under her homestead assignment, was in possession of the same land up to the time of her death, which occurred about two years ago." There was also evidence tending to show that the defendant had possession of this disputed land since 1873. If an exception is based upon the ground that there was no evidence to sustain the instruction, this Court cannot pass upon it unless all of the evidence is sent up. We have a statement in the case on appeal that there was evidence tending to show the contention of the plaintiff and that of the defendant, and we must take it to be true.

The exception cannot be sustained.

The judgment of the Court below must be

Affirmed.

HOLTON v. JONES.

(Filed November 17, 1903.)

1. WILLS—*Estates—The Code, sec. 2142—Devises and Legacies.*

Where realty is devised to a person and her children during their lifetime and then to go to her grandchildren, on default of grandchildren *in esse* at the death of testator the fee vests in the heirs at law of the testator to the use of any grandchildren who might thereafter be born.

2. WILLS—*Devises and Legacies—Heirs.*

The heirs of a testator, and not the residuary legatees, take property included in a lapsed specific devise, unless it appears that the testator intended it otherwise.

ACTION by A. E. Holton and others against P. L. Jones and others, heard by Judge *W. R. Allen,* at July Term, 1903, of the Superior Court of RANDOLPH County. From a judgment for the plaintiffs the defendants appealed.

Brittain & Gregson, W. P. Bynum, Jr., G. S. Bradshaw and *L. M. Scott,* for the plaintiffs.

U. L. Spence and *Hammer & Spence,* for the defendants.

CONNOR, J. This is an action brought for the recovery of the land described in the complaint, and submitted to the Court upon an agreed state of facts. On the 15th April, 1884, Alfred Holton died seized of the land, having first executed his last will and testament, the second item of which is as follows:

"I give and devise unto Sarah Ann Allen, wife of H. B. Allen, and the heirs of her body, for the natural love I bear unto the said Sarah Ann Allen and her offspring and for services she has rendered unto me before and since her marriage,

for the term of their natural lives, certain lands as follows: * * * To have and to hold to them, the said Sarah Ann Allen and the heirs of her body, during their lifetime, then to go to the grandchildren of the said Sarah Ann Allen and their heirs in fee-simple forever. It being my desire that the Bowen tract and the balance of the Moffitt tract, as described above, be allotted to Mattie Lucinda Allen, daughter of H. B. Allen and Sarah Ann Allen, when she arrives at the age of womanhood. It is my desire that the Allred tract, as mentioned above, be allotted to John Allen, son of H. B. Allen and Sarah Ann Allen, when he arrives at the age of manhood. I desire that an equal division be made according to valuation of all home lands and the pine tract, as described above, between the bodily heirs of Sarah Ann Allen, as aforesaid, without power of sale, as expressed in the beginning of this item."

Item eight of the will is as follows: "It is my desire that all such property that is not itemized and bequeathed or devised herein be sold at public auction to the highest bidder for cash, and the net proceeds to be placed at interest for the benefit of the bodily heirs of the said Sarah Ann Allen during their minority, when they arrive at the lawful age the principal, together with all interest accrued thereon, share and share alike, but no principal to be drawn during their minority."

The testator died without issue or lineal heirs, it appears from the agreed state of facts, and the plaintiffs are his heirs at law. At the time of the death of the testator Sarah Ann Allen had two children living, Mattie and John B. Mattie died intestate on April 13, 1893, unmarried and without issue. John B. died on June 22, 1899, unmarried and without issue. Sarah Ann Allen died on March 24, 1895, intestate.

The defendants are the collateral relations of John B.

Allen, deceased, and are in possession of the lands devised by the testator. There was other personal property not mentioned in the several items of the will, but no other real estate than that described.

His Honor rendered judgment in favor of the plaintiffs and the defendants appealed.

The title to the land, by the language of item two, passed to Sarah Ann Allen and her bodily heirs, which, reading the entire will, we construe to mean children for life, remainder to the grandchildren of the said Sarah Ann Allen. There being no grandchildren *in esse* at the time of the execution of the will or the death of the testator, the fee vested in his heirs at law. Upon the birth of grandchildren of Sarah Ann Allen, his heirs would have held to their use, and by operation of law the legal title would have vested in them—they taking as a class which would have opened to admit others answering the description of the class.

Pearson, J., in *Lea v. Brown*, 56 N. C., 148, says: "In regard to the land there is no difficulty; for it is a well settled rule that all real estate which is not effectually disposed of by will devolves upon the heir at law. * * * So that if a devise fails to take effect because it is void, or by reason of the death of the devisee, the subject devolves upon the heir." This was said without reference to section 2142 of The Code. If the land is directed to be sold by the executor the title is in the heir until the power is executed. *Ferebee v. Proctor*, 19 N. C., 439; *Proctor v. Ferebee*, 36 N. C., 143; 36 Am. Dec., 34; *Gay v. Grant*, 101 N. C., 219.

No grandchildren having been born to Sarah Ann Allen the question arises, to whose use do the heirs of the testator hold the land? The defendants contend that by virtue of item eight of the will the land is to be sold and the proceeds paid over to the representatives of the children of Sarah Ann

Allen, and that, as John B. Allen was the sole representative of his deceased sister, they, as his representatives, are entitled to the proceeds, or, as they elect, to take the possession of the land. It is doubtful whether in any aspect of the case the defendants can take as heirs of John B. Allen. If the eighth item be given the construction contended for by the defendants, the language operated as a conversion "out and out," and John B. would, at his majority, have taken the proceeds as personalty, and upon his death it would have passed to his administrator for distribution. In *Benbow v. Moore*, 114 N. C., 263, *Shepherd, C. J.*, quoting Williams on Executors, says: "That every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property." The case, however, was not presented or argued upon this view.

The plaintiffs contend that the eighth item is not a residuary clause, and that in no point of view does it include or have any reference to the land devised to Sarah Ann Allen in the second item. Section 2142 of The Code provides: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." This section of The Code, enacted in 1844, is a copy of the English statute upon the same subject. It will be observed that it provides for such devises as shall fail or be void: 1. By reason of the death of the devisee during the lifetime of the testator; 2. By reason of such devise being contrary to law; 3. Or otherwise incapable of taking effect.

If it should be conceded, as contended by the defendants, that item eight is within the definition of a residuary clause, and that a devise of land incapable of taking effect would, "unless the contrary intention shall appear by the will," pass thereunder, we are of the opinion that in this case a contrary intention is to be gathered from the entire will.

Mr. Schouler, in his work on Executors, section 521, says: "That on general principles the heir at law is favored as much as possible, even to the detriment of a residuary devisee; and, accordingly, a specific devise lapsing by the death of a devisee, the 'heir' and not the residuary legatee takes the advantage; and, in fact, whether a devise lapsed or was void *ab initio,* the residuary devise did not absorb it." This of course is without reference to the statute.

It is clear that the testator did not contemplate the sale of this land under item eight of his will. Sarah Ann Allen having at that time two children, he reasonably supposed that they would marry and children be born to them. He directs in item eight, that all such property that is not itemized and bequeathed or devised therein to be sold at public auction, etc., and the net proceeds placed at interest for the benefit of the bodily heirs of Sarah Ann Allen during their minority, etc. It is clear that in using the word "property" he intended to refer to personal property, because he had expressly itemized and devised the land. The contingency upon which there should be a failure of the devise could not possibly have happened until the death of the children of Sarah Ann Allen; hence he could not have intended that the very land which he had given to them, and carefully provided for an equal distribution between them "without power of sale," should be sold and the proceeds paid over to them. To place this construction upon his language would be to do violence to his manifest intention, and this the Court should never do, unless some positive and controlling rule of law commands it.

In *Henderson v. Wilson*, 16 N. C., 313, the testator directed his land to be sold and the proceeds applied to certain debts named. The object could not be accomplished. *Hall, J.*, in that case says: "It may, therefore, be taken for granted that as the devise of the lands cannot take effect under the first clause of the will, the heirs-at-law are entitled to the proceeds of the sale of such lands, unless some other clause in the will gives it another direction. * * * It is, however, contended that the testator has made a disposition of it in other parts of the will. * * * The only part of the will which it can be supposed has that effect is where he directs his five negroes, with all his horses, cattle, sheep, hogs, farming utensils, household furniture and *any other thing not mentioned in this my last will*, to be sold at public sale and the money arising therefrom to be applied to the payment of debts, funeral expenses, and after giving some legacies he directs the remainder or balance to be divided, etc." It was held that the land did not pass under the residuary clause, but that the proceeds went to the heir at law. This decision is put upon the intention of the testator as gathered from the will.

In *Lea v. Brown, supra*, the testator provided for the emancipation of certain slaves, which provision failed to take effect, because against public policy. The will contained a residuary clause. The Court held that the slaves passed to the distributees, *Pearson, J.*, saying: "So that, if the devise fails to take effect because it is void, or by reason of the death of the devisee, the subject devolves upon the heir, and the residuary devisee is not entitled to it—there being no reason for substituting a presumed general intention in place of the particular intention which has failed. * * * As the intention of the maker of a will ought to govern its construction, both in respect to personal and real estate, it would seem that the rules of construction ought to be applied with-

out reference to the different kinds of property, and the conclusion that, according to the rules which have been adopted in respect to personal property, these slaves, whom it was specifically the intention of the testator to favor, are to be sold to the highest bidder, like so many horses and hogs, in pursuance of his presumed general intention, is so monstrous as to furnish an instance of the *reductio ad absurdum.*" Referring to the contention to the contrary, he says: "This reasoning may be sound in regard to lapsed legacies, on the ground that the will speaks at the death of the testator, when he may be supposed to have been aware of the death of the legatee, and for that reason to have an intention to include the subject of the lapsed legacy in the residuary clause, but it is not sound in regard to legacies declared void; for at the death of the testator he supposed that he has made an effectual disposition of the subject to one, and cannot be presumed to intend to give it to another." So, in this case, it is manifest that the testator supposed that he had made a complete disposition of the land. He knew that at that time Sarah Ann Allen had no grandchildren, but he knew equally well that the provision which he had made for grandchildren to be thereafter born was effectual. The possibility of a failure of grandchildren did not occur to his mind. Certainly there is nothing in the eighth item which suggests an intention to provide for such possibility. It would be unreasonable to say that he gave the land to her children for their lives, expressly directing what portion each child should have and enjoy, and that they should have no power to sell, and yet in the eighth item direct a possible contingent interest to be sold and the proceeds applied to their use. Such intention is excluded by the will, read in the light of the facts agreed upon in this case.

In *Sorrey v. Bright,* 21 N. C., 114, 28 Am. Dec., 584, it is said: "That the extent of the rule prescribed by the statute

may be restricted by the special wording of the will. If the residue given is partial, that is, of a particular fund, the rule has no application. So where it is clear from the residuary clause itself, or other parts of the will, that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away, or which the will professed to give away, should not fall into the residue." The rule would not apply. See also *Allison v. Allison,* 56 N. C., 236, and *Alexander v. Alexander,* 41 N. C., 229.

We have not decided the question ably discussed in the briefs, whether item eight is a residuary clause, because, in our view, treating it as such, we find a contrary intention upon the face of the will, and accordingly hold that neither the land nor any interest therein is included in the eighth item.

His Honor correctly held that the plaintiffs were entitled to judgment, and his judgment to that effect must be

Affirmed.

GERRINGER v. NORTH CAROLINA HOME INSURANCE CO.

(Filed November 17, 1903.)

1. INSURANCE—*Insurable Interest—Equitable Interest.*

A person holding an equitable interest in property, such interest being known to the agent of the company, has an insurable interest therein.

2. INSURANCE—*Fire Insurance—Waiver.*

The failure to file proofs of loss within the time required by a policy does not work a forfeiture thereof, but unless waived by the company no action can be brought until the expiration of the required time after the filing of the proofs.

3. INSURANCE—*Fire Insurance—Proofs of Loss—Waiver.*

The denial of liability by a fire insurance company dispenses with the necessity of filing proofs of loss.

ACTION by C. D. Gerringer and John H. Gerringer against the North Carolina Home Insurance Company, heard by Judge *O. H. Allen* and a jury, at September Term, 1903, of the Superior Court of ALAMANCE County. From a judgment for the defendant the plaintiffs appealed.

Parker & Parker, for the plaintiffs.

Scales, Taylor & Scales and *Charles M. Stedman,* for the defendant.

CONNOR, J. This is an action on an insurance policy issued by defendant company to the plaintiff Charles D. Gerringer, "loss, if any, payable to John H. Gerringer and the assured, as their interests may appear." The policy is in the form prescribed by the insurance law of the State, known as the "Standard Fire Insurance Policy."

It was shown by competent testimony that the lot upon

which the dwelling house covered by the policy was located was conveyed to plaintiff Charles D. Gerringer by N. L. Gerringer by deed duly proven but not recorded until after the fire.

C. D. Gerringer executed two mortgages on said property, which were duly recorded. Joshua Gerringer, a witness for the plaintiff, testified that C. D. was his son. That he left home and for several months witness did not know where he was. In March and February, 1902, witness represented him. That the house was insured and witness had found the policy among his son's papers. Mr. Albright was agent of the defendant company. The mortgagees demanded their money. John H. Gerringer, an uncle of C. D., furnished the amount, $260, with which to pay the mortgage debts, and they were assigned to the witness. Witness got N. L. Gerringer to execute a deed to John H. Gerringer to secure payment, and he gave to witness a bond obligating himself to convey to him the property upon payment of the amount advanced. This deed was recorded March 21, 1902, and on the same day the bond was executed. Witness on same day notified the agent how the matter had been arranged; told him all about the arrangement, and he, the agent, wrote across the policy, "Loss, if any, in absence of C. D. Gerringer to be paid to J. H. Gerringer," and signed it. During the month of June, 1902, Albright came to witness while at work in a cornfield and brought the policy sued on and said it was just like the other policy, asking witness to take it in place of and surrender the first policy, which witness did, paying the small amount which Albright said was due on the premium. Albright said that it was all right. This was after witness had told him about the condition of the title to the property. The house was built on the lot after the first deed was made, costing about $1,500. It was burned July 22, 1903. Witness, in the entire transaction, was acting for his

son Charles D. Gerringer. He had a conversation with Albright two or three weeks after the fire. Albright said that Charles D. Gerringer had the house insured when he had no title to the property. Witness told him that he had the deed and asked him what the company was going to do. Albright said that he had sent a man to investigate and did not know what the company would do. Witness had other conversations with Albright, a "half a dozen or more," in which he said that he hoped they would get the matter adjusted. About two months prior to the bringing of this action in April, 1903, Albright told witness that he understood the company would not pay the loss.

J. H. Gerringer testified for the plaintiff that immediately after the fire he had notice written and sent to Albright notifying him of the fire. In about a week he saw Albright, who said that he had received the notice and sent it to the company; that he had not heard from it, but would write again. No proof of loss was ever filed.

His Honor upon the foregoing evidence sustained a demurrer and the plaintiff excepted, and from a judgment dismissing the action appealed.

The appellant contends that Charles D. Gerringer had an insurable equitable interest in the property, and that the condition of the title being known to the agent of the defendant, his knowledge was the knowledge of the company. The case comes clearly within the principle announced by this Court in *Grabbs v. Ins. Co.*, 125 N. C., 389, in which *Douglas, J.*, says: "Having thus an equitable, if not a legal, title to the land, they had an insurable interest therein." The opinion is amply sustained by the authorities cited. We do not think it necessary to do more than cite with approval the unanimous opinion of the Court in that case. There can be no question that as J. H. Gerringer was, in the entire transaction, acting for his son, the status of the title to the

lot is the same as if the son in his own proper person had conducted the negotiation. Joshua Gerringer holds the legal title in trust, first, to secure the amount advanced by him to pay the mortgage debts, and then to convey to J. H. Gerringer, who would hold in trust for Charles D. Gerringer. This vests in both Charles D. and Joshua an insurable interest. If the jury believe the evidence, and find that these facts were known by the agent of the company, it will not be permitted to deny its liability on the contract. We cite with approval the language of *Mr. Justice Douglas* in *Grabbs v. Insurance Co., supra:* "We think the rule is well settled that where an insurance company, life or fire, issues a policy with full knowledge of existing facts, which by its terms would work a forfeiture of the policy, the insurer must be held to have waived all such conditions, at least to the extent of its knowledge, actual or constructive. It cannot be permitted to knowingly issue a worthless policy upon a valuable consideration. An implied waiver is in the nature of an estoppel *in pais,* which might well be enforced by any court of equity under such circumstances." It would seem that common fairness would demand that upon a full, frank disclosure of the condition of the title to the property made to the agent of the company at the time of or before the issuing of the policy, and as the basis therefor, the agent should inform the applicant that he had no insurable interest, if such was the case, or, in default thereof, bind his principal to perform its contractual obligations. This is nothing more than the application to the contract of insurance of the well-settled elementary principle that if one fails to speak when it is his duty, he shall not thereafter be permitted to do so for the purpose of avoiding a liability assumed at the time of such failure. If there be any concealment of fraudulent representation of material facts by the insured, the same principle relieves the insurer from liability. The contract of insurance must be

the result of fair, honest disclosures of all facts material to the risk assumed. These principles are recognized and enforced by all of the courts, both State and Federal. That notice to the agent of all matters affecting the risk is notice to the company is well settled by abundant authority. *Horton v. Ins. Co.*, 122 N. C., 499; 65 Am. St. Rep., 717.

The defendant, however, says that by the terms of the policy it was the duty of the insured, within sixty days after the fire, to file proofs of loss, and that failure to do so constitutes a complete defense to this action. The plaintiff contends, first, that by a proper construction of the language of the policy the failure to file proofs of loss within sixty days does not work a forfeiture of the policy; and, second, that if it should be held to do so such requirement was waived by the action of the agent. This contention presents to this Court for the first time the question as to what effect a failure to file proofs of loss within sixty days will have upon the right of the insured to enforce the payment of the policy. It will be observed that in certain respects and upon certain contingencies the policy is declared to be void, whereas in other respects the assured assumes the discharge of certain duties; for instance, "this entire contract shall be void if the insured has concealed or misrepresented, etc." Again, "this entire policy, unless otherwise provided, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, etc." "If fire occur the insured shall give immediate notice of any loss thereof in writing to this company, protect the property from further damage, etc., and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, etc." "The insured, as often as required, shall exhibit to any persons designated by this company all that remains of any property herein described, etc." "No suit or action on this policy for the recovery of any claim shall be

sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This Court has uniformly held that where it is expressly provided that the policy upon certain contingencies shall be void, effect will be given to such language. *Hayes v. Ins. Co.*, 132 N. C., 702; *Biggs v. Ins. Co.*, 88 N. C., 141; *Sossamon v. Ins. Co.*, 78 N. C., 145; *Sugg v. Ins. Co.*, 98 N. C., 143.

Mr. Ostrander, in his work on Fire Insurance, section 223, says: "The requirement that the proof of loss shall be furnished within a stated time is not in the form of a condition or of an express warranty. Failure to comply will not prevent a recovery under the policy." A distinction is made between those conditions and provisions accompanied by the declaration that a failure to comply with them will render the policy void and those stipulations which are mere promises on the part of the insured to do the acts required after the fire, and the distinction is clearly established by many well-considered cases. In stating the rule of the modern cases upon the subject, it is said in 13 American & English Encyclopedia (2 Edition), p. 329: "The foregoing statement represents the rule upon which the authorities are manifestly coming to agree, although it is not to be denied that such rule is not yet uniformly established." In *Hall v. Ins. Co.*, 90 Mich., 403, the Court says: "We think it was intended that these provisions relating to the method of adjustment of loss and payment thereof should stand by themselves, and that they furnish their own penalty for failure to comply with the strict terms of the policy, namely, that the claim should not be due until sixty days after the full completion of all the requirements contained therein, and that no action should be commenced after six months from the date thereof." In *Steele*

v. Ins. Co., 93 Mich., 81; 18 L. R. A., 85, the Court in construing the several provisions in the policy uses the following language: "This omission in an instrument replete with clear and explicit declarations of forfeiture is worthy of note. The presence of the declaration of forfeiture in every other instance and its absence in this is clearly not an oversight. Time is not made the essence of the provision relating to proofs, and in the paragraph relied upon by the defendant the words 'until after' import order or sequence rather than an intent to make performance within the time specified the essence of the requirement. The selection of this phraseology seems to be inconsistent with such a purpose. The language has reference to the thing to be done before suit is brought rather than the time within which it is to be done." In *Rheims v. Ins. Co.,* 39 W. Va., 672, it is held that "proofs of loss are no part of the contract of fire insurance, nor do they create the liability to pay a loss; they serve to fix the time when it becomes payable and when an action may be commenced to enforce a liability." To the same effect is *McMaster v. Ins. Co.,* 55 N. Y., 222; 14 Am. Rep., 239; *Coventry v. Ins. Co.,* 102 Pa. St., 281. In *Kanweiler v. Ins. Co.,* 57 Fed. Rep., 562, it is said: "A failure to furnish the proofs of loss within thirty days did not work a forfeiture of the policy. It merely delayed the date when the loss would become payable, the insurer having sixty days after the proofs were furnished to make payment or replace the property destroyed." See also *Kenton v. Ins. Co.,* 90 Ky., 236.

We adopt with approval the language of the Court in *Rheims v. Ins. Co., supra:* "The foregoing authorities and the weight of others we have had an opportunity of examining have a strong tendency to show that where the condition in a policy requires proofs of loss to be furnished in a specified time, it is to be construed liberally, and the insurer cannot defeat the policy on that ground, when strict compliance has

been excused by the acts or conduct of the agents of the insurance company."

We are therefore of the opinion that a failure to file proofs of loss within sixty days, as required by the policy, did not work a forfeiture of the policy, but that, unless waived by the company, no suit or action can be brought until the expiration of the sixty days after the filing of the proofs of loss, and not more than twelve months after the expiration of the sixty days, as held by this Court in *Muse v. Ins. Co.*, 108 N. C., 240. *Dibbrell v. Ins. Co.*, 110 N. C., 193; 28 Am. St. Rep., 678; *Lowe v. Ins. Co.*, 115 N. C., 18.

Failure to file the proofs of loss will not work a forfeiture of the policy, but precludes the plaintiff from maintaining an action "until after sixty days" from the filing thereof. The provision requiring the insured to file proofs of loss, contained in the policy, is reasonable, and read in the light of the further provision that "no suit shall be brought," etc., protects the company from an action until it has been complied with unless waived by some action on its part. In this case, while we would hold that the testimony in regard to the action of the agent should be submitted to the jury upon the question of waiver of the duty to file proofs of loss within sixty days, if material, such conduct would not waive the right to demand compliance with the requirements before the action was brought. In the view which we have taken of the case, however, the question of waiver to file within the sixty days is immaterial.

Does the denial of liability dispense with the necessity altogether of filing proofs of loss? May on Insurance (4 Edition), section 469, thus lays down the law, which seems to be fully sustained by the authorities cited: "A distinct denial of liability and refusal to pay on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proofs of loss. It is equivalent to a declara-

tion that they will not pay, though the proofs be furnished; and to require the presentation of proofs in such a case, when it can be of no importance to either party, and the conduct of the party in whose favor the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not require. The Supreme Court of the United States in *Life Ins. Co., v. Pendleton,* 112 U. S., 696, uses the following language: 'The plaintiffs in error further contend that the charge was erroneous in holding that no formal proof of the death of S. H. Pendleton was necessary in this case. On this point the charge was as follows: 'As to the proof of loss not being filed, it is conceded notice of the death was given. If, when that was done, the agents of the company repudiated all liability and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file it cannot alter the case.' We think that there was no error in this instruction. The weight of authority is in favor of the rule that a distinct denial of liability and refusal to pay, on the ground that there is no contract or that there is no liability, is a waiver of the condition requiring proof of loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished.' *Mr. Justice Bradley* further says that "The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground, without reference to the want or defect of the preliminary proof, the occasion for it ceases and will be deemed to be waived. And this can work no prejudice to the insurers, for in an action on the policy the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proofs were exhibited or not.' "

So in our case the failure to file the proofs of loss does not

relieve the plaintiff of the duty of proving that in all other respects he had complied with the terms of the policy, the value of the property and any other facts material and necessary to his recovery, leaving open to the defendant to make such defenses as might be available to it.

In *Thwing v. Insurance Co.,* 111 Mass., 93, *Mr. Justice Gray,* afterwards of the Supreme Court of the United States, says: "Nor can the insurance company be now permitted to avail itself of the want of formal notice and proof of this claim in order to defeat a recovery. When an insurer, with knowledge of a claim made under a policy, rests his defense exclusively on other grounds, he is deemed to have waived all objections to the sworn statements and sufficiency of the notice and proof of loss." The Supreme Court of Connecticut, in *Norwich v. Ins. Co.,* 34 Conn., 561, says: "There is no error in that part of the charge which instructed the jury that the suit was not prematurely brought. There was a provision in the policy that the loss was payable at any time within sixty days after notice and preliminary proofs to the underwriters. Had the matter gone through the formal stages provided for in the policy, and the proofs been made without any denial of all liability on another ground, then no suit could have been sustained on the policy until sixty days had expired. This clause was for the protection or convenience of the underwriters; but when they waived the preliminary proofs they also waived the benefit of this stipulation and rendered it nugatory. It would be absurd to say that they still retained the right to have sixty days within which to pay a loss which they had declared that they would not pay at any time nor under any circumstances." In *Grange Mill Co. v. Ins. Co.,* 118 Ill., 396, the Court uses the following language: "It is said there is no proof of loss given by the assured. That fact was waived by the company's placing their refusal on the sole ground that the assured had no title to the property

destroyed." In *Doggett v. Order of the Golden Cross,* 126 N. C., 477, *Mr. Justice Montgomery,* speaking for the Court, said: "If an insurance company should refuse to pay the amount of the policy, or deny its liability upon an independent ground, or put its refusal exclusively on other grounds, before proofs of loss are made and before the expiration of the time within which such proofs are by the terms of the policy to be made, such denial and refusal would constitute a waiver of the condition requiring notice and proofs of loss. Such a denial and refusal would be just the same as a declaration and a notice to the beneficiary that payment would not be made in any event. The law does not require a vain thing to be done, and such a refusal and denial would make it unnecessary to give notice and proofs of death, since the company had refused absolutely to pay for such reasons." *Dibbrell vs. Ins. Co., supra,* at p. 205.

The principle is illustrated by the case of *Felton v. Hales,* 67 N. C., 107, which was an action for the recovery of property alleged to be held by the defendant as bailee. He set up title in himself, and alleged further that there had been no demand. The Court said: "This Court thinks that inasmuch as the defendant in his answer set up title to the mill and claimed it as his absolute property, no demand was necessary. *Cui bono* make a demand?

These authorities seem to settle the question that the defendant company, by its denial of liability, waived the filing of the proofs of loss. For the reasons and upon the authorities herein given, we think his Honor was in error in sustaining the demurrer. The case should have gone to the jury under proper instructions from the Court.

It must be conceded that the more modern cases, both in this and other courts, cannot be reconciled with some expressions used in *Boyle v. Ins. Co.,* 52 N. C., 373, and *Woodfin v.*

Ins. Co., 51 N. C., 558. The question involved has undergone thorough examination in the State and Federal Courts in recent years, and the rights and liabilities of insured and insurers more clearly defined and brought into harmony with the conditions of modern life in its relation to life and fire insurance contracts.

New trial.

KELLY v. DURHAM TRACTION COMPANY.

(Filed November 17, 1903.)

1. MALICIOUS PROSECUTION—*Warrant—Evidence.*

In an action for malicious prosecution it is not necessary to show that the defendant company swore out the warrant, it being sufficient if it directly or indirectly procured it to be issued.

2. ISSUES—*Malicious Prosecution—Illegal Arrest—Damages—The Code, sec. 395.*

Where an action is for malicious prosecution and illegal arrest, and an issue is submitted as to each, two issues should be submitted as to damages.

A PETITION TO REHEAR this case, reported in 132 N. C., 368.

Manning & Foushee, for the petitioner.
Boone, Bryant & Biggs, in opposition.

DOUGLAS, J. This case is before us on a rehearing, having been decided in 132 N. C., 368. As, after careful consideration, we see no reason to change our opinion, and as the points relied on in the petition to rehear were discussed in our former opinion, we can add but little thereto. We there held

that while there was no evidence that the defendant swore out the warrant, there were evidential circumstances from which the jury might infer that the warrant was issued at the instigation of the defendant. It is not necessary that the defendant should, through one of its authorized agents, make the affidavit on which the warrant is issued, or directly apply therefor. It is sufficient if it directly or indirectly procured it to be issued. The following extract from the case of *Holden v. Merritt,* 92 Iowa, 707, clearly expresses our own views: "If the jury believed this testimony, as they had a right to do, although much of it was denied by the defendant, then it is apparent that the defendant set the machinery of the law in motion; at least the jury was authorized to so find. It need not be shown that the defendant ordered or directed the warrant or process to issue, or that he participated in its execution. If he, on his own motion, gave information or made complaint to the officers of the law in such a manner as that in the regular and ordinary course of events an arrest must be made or will probably follow, this is sufficient to warrant the jury in finding him the real prosecutor." Practically to the same effect is *Tangney v. Sullivan,* 163 Mass., 166. In our former opinion it is said that "it is not necessary to show who actually swore out the warrant, provided it was at the instigation or procurement of the defendant (citing authorities). There was evidence tending to prove that the defendant instigated the prosecution. It is true it is merely circumstantial, but if circumstantial evidence is competent on an issue of life or death we see no reason why it is not equally competent in civil cases." While the warrant itself was not offered in evidence, it is not denied that it was issued, and in fact it is admitted in the defendant's answer and prayers for instructions. As the jury have found, under proper instructions and upon more than a scintilla of evidence, that the defendant pro-

cured the issue of the warrant, we can see no reason to disturb the verdict.

While we find no error that can affect the judgment in the present case, there is a defect of issues that might have necessitated a new trial as to both causes of action had there been error in the submission of either. The plaintiff declared on two distinct causes of action illegal arrest and malicious prosecution, which were properly submitted under distinct issues, and yet there was only one issue as to damages. As the answer to this issue included the damages arising from both causes of action, an error upon either of the foregoing issues would have necessitated a new trial, as the damages could not be proportioned between them. Perhaps this omission would be immaterial in a majority of cases, as, for instance, like that at bar, where the issue as to damages is evidently intended to include the sum total arising from both causes of action. Where only one cause of action is found in favor of the plaintiff it would be equally immaterial, as the damages would be presumed to arise therefrom; but a verdict including damages arising from both causes of action must necessarily be set aside if either cause fails to be sustained on appeal. To prevent any such miscarriage, and to sustain the orderly method of procedure, we think that a separate issue should be submitted as to the damages arising on each distinct cause of action. The plaintiff would of course be entitled to the sum total of both issues if found in his favor, but this sum would not and should not exceed that which would have been found in a single issue wherein both causes of action are united.

By distinct causes of action we mean those that are separate and distinct in fact, and not those which merely state different legal phases of the same transaction. The necessity for the submission of issues, whether tendered or not, sufficient to sustain the judgment has been too recently and fully

discussed by this Court to require further elaboration. *Strauss v. Wilmington,* 129 N. C., 99; *Pearce v. Fisher,* at this term. In *Tucker v. Satterthwaite,* 120 N. C., 118, this Court says, on page 122: "We are not inadvertent to the long line of decisions laying down the rule that the refusal of the Court to submit an issue tendered by either party cannot be reviewed by this Court unless exception is taken in apt time, nor do we wish to be understood as reversing or modifying it. That rule, when reasonably construed, does not conflict with the one herein laid down. What we now say is that section 395 of The Code is mandatory, binding equally upon the Court and upon counsel; that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues or admissions of record equivalent thereto sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial."

As the additional issue was not material in the case at bar, and we find no substantial error in the trial of the action, the petition to rehear must be dismissed.

Petition dismissed.

COBLE v. HUFFINES.

(Filed November 17, 1903.)

1. MALICIOUS PROSECUTION—*Evidence—Malice—Probable Cause—Presumptions.*

Where the plaintiff in an action for malicious prosecution was acquitted on two separate indictments, the prosecutions must be identical, and the second must have been instituted without any evidence additional to that produced at the trial of the first, in order to show the absence of probable cause and to raise the presumption of malice.

2. MALICIOUS PROSECUTION—*Evidence—Malice—Probable Cause.*

In an action for malicious prosecution, an order in the criminal prosecution designating defendant as the prosecutor, and taxing him with the costs, is not admissible against him either to show malice or the want of probable cause.

3. MALICIOUS PROSECUTION—*Evidence—Malice.*

In an action for malicious prosecution a statement of the defendant that he would spend one thousand dollars to have his revenge is some evidence of malice.

A PETITION TO REHEAR this case, reported in 132 N. C., 399.

J. A. Barringer and *A. L. Brooks,* for the petitioner.
Scales, Taylor & Scales, in opposition.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided at the last term and is reported in 132 N. C., 399. In the trial below, at the close of the plaintiff's testimony, the Court having intimated that the plaintiff could not recover, he submited to a non-suit and appealed.

The action was for malicious prosecution. It appeared that the defendant had bought from the plaintiff a horse, and at the time of the purchase the plaintiff represented, as the

defendant alleged, that the horse was sound. The defendant kept the horse about a month, when he discovered that he was not sound, and insisted that the plaintiff should take him back. The plaintiff then agreed to give a mare in exchange for the horse, representing that the mare would not balk. This proposal the defendant accepted and the exchange was made. The defendant afterwards found that the mare did balk, and then caused the plaintiff to be arrested and tried before a justice of the peace, who bound him over to court for obtaining goods by false pretences. The warrant was issued upon an affidavit made by the defendant, and the case in the Superior Court was prosecuted by him. At the trial of the indictment upon this charge the plaintiff was acquitted. Another indictment was sent against the plaintiff at the same term for obtaining goods by false pretences, it being based upon the first transaction—that is, the purchase of the horse. The particular allegation of the indictment was that the plaintiff had represented to the defendant that the horse was sound, which representation was known to be false, and by reason thereof the plaintiff had obtained the price of the horse from the defendant. The defendant was acquitted also at the trial of this indictment, and the Court, having found that the prosecution was frivolous and malicious and not required by the public interest, directed that the defendant in the present case, Huffines, be marked as prosecutor, and adjudged that he pay the costs of the prosecution.

At the trial of this case for malicious prosecution, which is based, as we have said, upon the second transaction—that is, the mare trade—the plaintiff proposed to introduce as evidence the finding and order of the Court by which the defendant was marked as prosecutor and taxed with the costs in the second indictment, but upon objection from the defendant the evidence was excluded and the plaintiff excepted.

At the last term, when this case was heard, it was supposed,

and was so stated in the opinion, that the two indictments were based upon one and the same prosecution, and that the case was therefore within the principle of the decision in *Hinson v. Powell,* 109 N. C., 534. Upon a more careful examination of the record we are satisfied that the two prosecutions were not the same, nor were they practically the same, so as to render the proceedings in regard to the second indictment competent as evidence in the trial of the first indictment. In order to bring the case within the principle of *Hinson v. Powell, supra,* the two indictments must have been for the same offense and not merely for similar offenses. In other words, there must be a complete identity between the two prosecutions, and the second must have been instituted without any evidence additional to that introduced at the trial of the first indictment, in order to show the absence of probable cause and to raise the presumption of malice. We do not think the principle of that decision applies to this case, as the facts now appear to us.

We are further of the opinion that the proposed evidence was properly excluded, as the order of the Court by which the defendant was marked prosecutor and taxed with the costs could not for any purpose be competent against the defendant, not even to show malice or the absence of probable cause. That was a proceeding merely for the taxation of costs, to which the plaintiff in this case was in no sense a party, and the finding and order of the judge could no more be evidence in his behalf, for the purpose of showing malice or of establishing any other fact necessary to a successful prosecution of this suit, than could be the action of the Court in any other judicial proceeding to which the plaintiff was not a party. It adjudges nothing and proves nothing as between the plaintiff and the defendant in this case, and is *res inter alios acta.* It cannot bind or affect this defendant as an estoppel or under the principle of *res judicata,* because in order to do so both

parties in this suit must have been parties to the litigation out of which the estoppel arose or in which the adjudication was made, and it cannot be evidence for the same reason. What was said and done by the judge is, as to the parties to this action, nothing more than the expression of his opinion that the prosecution was malicious and that the defendant should be marked as prosecutor and taxed with the costs. The case of *Casey v. Sevatson*, 30 Minn., 516, seems to be directly in point. In that case the Court said: "In the course of the trial of the present action the plaintiff offered in evidence the docket entries of the justice in the alleged malicious prosecution, which, among other things, contained the following: 'Upon due consideration of the evidence given in this case it is adjudged that the complaint was malicious and without probable cause, and that Erick Sevatson pay the costs of this action.' Defendant specifically objected to the admission in evidence of that part certifying that the complaint was malicious and without probable cause, but the objection was overruled and exception taken. Defendant also excepted to the Court's refusal to instruct the jury to disregard the docket entries, 'so far as they relate to the complaint being malicious and without probable cause.' The entry referred to was made by the justice in conformity to a provision of the statute. This provision is evidently framed for the sole purpose of relieving the public of costs by saddling them upon the complainant, through whose unjustifiable action they have been incurred. It could never have been intended that the certificate should have the effect of an adjudication in favor of the party complained of and against the complainant, that the complaint was malicious and without probable cause; for, first, the proceeding in which it is made is not between those parties, but, as respects the complainant, purely *res inter alios;* and, second, it is not the result of any proceeding which can be called a 'trial,' as respects the complainant. And yet, if the

certificate is to be received in evidence at all in an action for malicious prosecution, it must be received as a species of adjudication or judgment. Certainly it would not be admissible as the mere opinion of the justice. We think the learned Judge erred in receiving the entry objected to in evidence, and in refusing the instruction to disregard it."

We must not be understood as deciding that the record of the second indictment is altogether incompetent, as we have only referred to that part of the record in which the prosecution is adjudged to be malicious and the defendant is taxed with the costs. It may be that the record of the plaintiff's acquittal would be evidence in this case to show malice if it established by competent proof that the second indictment was instituted by the defendant with malice. *Brink v. Black,* 77 N. C., 59; *State v. Weaver,* 104 N. C., 758. But the entry on the record, which the plaintiff proposed to introduce, was not such evidence as could be heard for that purpose. We therefore hold that the entry was incompetent and was properly excluded by the Court, and in this respect the former opinion is modified.

This does not change the judgment of the Court by which a new trial was awarded. The lower Court instructed the jury that there was no evidence upon which the plaintiff could recover. In this there was error, as we find it stated at page 17 of the record that the defendant Huffines, speaking of the prosecution for false pretences, had declared that he would spend a thousand dollars in order to have his revenge. This was, of course, some evidence of malice, and, as the Court virtually withdrew the case from the jury by its ruling, the plaintiff is still entitled to a new trial because of this error.

We do not understand the defendant in his petition for a rehearing to ask distinctly for an affirmance of the judgment below, but rather for a modification of the former opinion of this Court, so that he will not be prejudiced at the

next trial by the erroneous ruling in regard to the entry on the record in indictment No. 103. This error is corrected, but the former decision must stand and the petition to rehear will be dismissed, as there was other evidence in the case which tended to prove malice and which should have been submitted to the jury.

Petition dismissed.

DOUGLAS, J., concurs in result only.

OSBORN v. LEACH.

(Filed November 17, 1903.)

1. JUDGMENTS—*By Default and Inquiry—Excusable Neglect—Affidavits—Findings of Court.*

   On appeal from a refusal to set aside a judgment by default and inquiry on the ground of excusable neglect, affidavits will not be considered; the findings of fact by the judge being conclusive.

2. JUDGMENTS—*Setting Aside—Excusable Neglect—Evidence—The Code, sec. 274.*

   The facts in this case are not sufficient to justify the setting aside of a judgment by default and inquiry.

3. JUDGMENTS—*Setting Aside—Excusable Neglect—Meritorious Defense.*

   A defendant against whom a default judgment has been taken is not entitled to have the default opened and judgment set aside merely because he has a meritorius defense, if his failure to assert it was not due to excusable neglect.

4. JUDGMENTS—*By Default and Inquiry—Actions—Damages—Costs—Burden of Proof—The Code, sec. 385.*

A judgment by default and inquiry merely admits a cause of action, and carries only nominal damages and costs; the burden of proving any damages beyond a penny being still upon plaintiff.

A PETITION TO REHEAR this case, reported in 132 N. C., 1149.

F. H. Busbee & Son and *J. A. Barringer,* for the petitioner.
J. T. Morehead and *King & Kimball,* in opposition.

CLARK, C. J. This is a petition to rehear this case, in which the judgment below was affirmed at the last term by a *per curiam* decision, 132 N. C., 1149. *Per curiam* decisions are made after as full consideration by the Court as those in which opinions are filed, but the principles involved being well settled, it is not deemed necessary to duplicate reasons which are to be found in other opinions.

On re-argument we see no reason to change our former conclusion. This was an appeal from a refusal to set aside a judgment by default and inquiry on the ground alleged of excusable neglect. The Code, sec. 274. The affidavits of both sides are sent up in the record, but improperly, for we cannot consider them, since the findings of fact by the Judge are conclusive on appeal. *Norton v. McLaurin,* 125 N. C., 185; *Sykes v. Weatherly,* 110 N. C., 131; *Albertson v. Terry,* 108 N. C., 75; *Weil v. Woodard,* 104 N. C., 94, and other cases cited in Clark's Code (3 Ed.), p. 311.

The facts found by the Judge are in substance: That the appellant and another, both living in Raleigh, were served in due time before Court with a summons in an action for libel returnable to June Term, 1901, of Guilford Superior Court. His co-defendant appeared by counsel, obtained extension of time for answering, and filed answer at the next succeeding

term. The appellant made no appearance by attorney or in person, filed no answer or other pleading, and the plaintiff having filed a verified complaint took judgment by default and inquiry. When the summons was served upon the appellant he applied to a law firm in Raleigh, who told him they did not attend regularly the Courts in Guilford, but advised him to employ another counsel, also residing in Raleigh, who frequently attended the Guilford Courts, and the appellant did so, said counsel drawing a demurrer, which, according to his best impression, was, immediately upon being drafted, mailed to the Clerk of the Superior Court of Guilford, but whether addressed to J. N. Nelson (the name of such Clerk) said counsel is not certain, but he took the demurrer, stating at the time he would mail it, whereupon said law firm told the appellant that as the case stood on a matter of law, it would not be necessary for him to go to Guilford Court till notified by counsel, as that docket was crowded and the case could not be reached in some time. The records of the Court fail to show any demurrer or other pleading having been filed by the appellant, and the Clerk has no recollection of ever receiving any by mail or otherwise. The Judge further finds that neither the law firm first employed by the appellant, nor the other counsel called in on their recommendation, attended Guilford Superior Court regularly, though the latter usually did so; that regular terms of the Superior Court were held in Guilford in June, August, September, October and December, 1901, and January, 1902, as provided by law, at none of which (six consecutive terms) any counsel for appellant was present. At the February Term, 1902, being the sixth term after that at which the judgment was taken, a motion to set it aside was made by a counsel resident in Greensboro, who was then first employed by the appellant. The appellant did not learn of the judgment by default and inquiry till said February Term, 1902, at which time, said counsel being con-

fined to his bed by illness, the appellant went to Greensboro in person and employed counsel there to move to vacate the judgment, and that the appellant has a meritorious defense.

Upon the above facts his Honor properly held that the negligence of the appellant was not excusable. This Court has always held that to hold a party excusable when his counsel has been negligent he must have employed counsel *"regularly attending the court"* in which the action is pending, or "who engages to go there specially to attend to the matter." *Manning v. Railroad,* 122 N. C., 828. Here the Judge finds that neither of the counsel spoken to by the appellant regularly attended Guilford Superior Court, and neither engaged to go there to attend to filing the demurrer, for the client understood that the paper was to be sent by mail. Had the appellant employed counsel regularly attending that Court, or engaged counsel specially to attend June Term, 1901, such counsel would have known that the demurrer was not filed, and could have filed it at any time up to the moment of adjournment, and this matter would not be now before the Courts. The appellant had ample time to get counsel in Greensboro (as he did later) or to employ counsel who would agree to go there, but he contented himself with non-resident counsel promising to send a paper by mail and let his case make its own way in Court, like a log floating down a stream, without any attention or inquiry till the sixth term thereafter. For six terms he does nothing, has no one regularly attending the Court (or agreeing to regularly attend it for this case) to give it attention for him, and then at the seventh term he interrupts the trial of other business which has been regularly attended to by asking the Court to relieve him from the consequences of his negligence and a judgment by default and inquiry, which had been regularly taken in due course. Even if the appellant had employed counsel regularly attending the Court, his failure to pay any attention to the matter

for so many terms was inexcusable. *Whitson v. Railroad,* 95 N. C., 385. Had he inquired he would have learned that none of his counsel had been to Greensboro, and that they knew no more about the *status* of his case and whether or not the demurrer had been filed than he did. The employment of counsel did not relieve him of all responsibility, but he must still "give it that attention which a prudent man gives to his important business." *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 391, cited with approval in *Pepper v. Clegg,* 132 N. C., 315. Failure of a party to attend Court because he knew nothing personally about the cause of action and "because his counsel knew of his defense" was held not excusable neglect. *Waddell v. Wood,* 64 N. C., 624. "A defendant does not abandon all care of his case when he has engaged counsel to look after it." *Roberts v. Allman, supra; Henry v. Clayton,* 85 N. C., 371; *Vick v. Baker,* 122 N. C., 98. Those were all cases where counsel were actually present at the Court. Here the appellant not only had no counsel there and knew that the counsel he retained did not expect to attend the June Term, for the demurrer was to be sent by mail, but makes no inquiry and learns nothing of the fate of his case till the seventh term. Had he even made inquiry after June Term was closed he would have found that the demurrer had not been filed and that judgment by default and inquiry had been taken, and if he had moved at August Term, at which term the plaintiff had agreed that the other defendants should file answer, it is probable no objection would have been made to striking out the judgment and giving the appellant the same favor. The fact that the appellant has a meritorious defense has no effect, if his failure to assert it at the proper time was not due to excusable neglect, for it is only when there is excusable neglect shown that it must further appear that the defendant has a meritorious defense. *Turner v. Machine Co.,* at this term.

Fortunately, however, for the defendant, the judgment by "default and inquiry" carries only a judgment for penny and costs. Such judgment, says 2 Black on Judgments, sec. 698, "merely admits a cause of action, while the precise character of the cause of action and the extent of the defendant's liability remain to be determined by a hearing in damages and final judgment thereon; the cause of action is not merged in the judgment, and the rights of parties, beyond the mere admission of a cause of action, are neither strengthened nor impaired thereby." *Welch v. Wadsworth*, 30 Conn., 149; 79 Am. Dec., 239. Our own decisions hold to the same effect that a judgment by default final under The Code, section 385, admits the allegations of the complaint, but a judgment by default and inquiry admits only a cause of action and carries only nominal damages and costs, the burden of proving any damages beyond a penny being still upon the plaintiff. *Parker v. Smith*, 64 N. C., 291; *Parker v. House*, 66 N. C., 374; *Rogers v. Moore*, 86 N. C., 85; *Anthony v. Estes*, 101 N. C., 541.

Petition dismissed.

ROWE v. CAPE FEAR LUMBER CO.

(Filed November 17, 1903.)

1. BOUNDARIES—*Deeds—Swamps.*

Where a deed calls for a swamp and thence with the run of said swamp, the first call must go to the *run* of the swamp and not terminate at the edge of the same.

2. BOUNDARIES—*Deeds—Swamps—Questions for Jury.*

Where a deed calls for the mouth of a stream emptying into a swamp, the location thereof should be left to the jury.

3. BOUNDARIES—*Deeds—Swamps—Questions for Jury.*

Where the calls in a deed are ambiguous or uncertain, it is a question for the jury to decide what was meant.

4. BOUNDARIES—*Deeds—Questions for Jury.*

Where a call in a deed terminates at a swamp, the question whether the edge or run of the swamp is meant is for the jury.

5. PARTIES—*Abatement—Executors and Administrators.*

In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined.

6. ABATEMENT — *Dismissal — Executors and Administrators — The Code, sec. 188—Acts 1887, ch. 389.*

A motion to dismiss an action for trespass for failure to make an administrator a party thereto cannot be made in the supreme court.

7. ISSUES—*New Trial.*

Where an issue is general, embracing within its scope several distinct tracts of land, a new trial thereon must be general.

ACTION by J. W. Rowe and M. V. Dosh against the Cape Fear Lumber Company, heard by Judge *R. B. Peebles* and a jury, at March Term, 1903, of the Superior Court of PENDER

County. From a judgment for the plaintiffs the defendant appealed.

Stevens, Beasley & Weeks, for the plaintiffs.
Rountree & Carr, for the defendant.

WALKER, J. This is an action brought by the plaintiff to recover damages for a trespass alleged to have been committed by the defendant in cutting timber in Catskin Swamp. The liability of the defendant depends upon whether the boundaries described in the grants and mesne conveyances, under which it claims the disputed land, stop at the edge or margin of the swamp or extend to its run. Plaintiffs introduced in evidence a grant from the State, dated December 20, 1893, to the plaintiff John W. Rowe, and a deed from the latter to his co-plaintiff L. P. Dosh for an undivided one-half interest in the land granted. It was admitted that the grant and deed covered the *locus in quo*.

The defendant introduced grants and mesne conveyances by which it claimed to have acquired the title of three tracts of land, one on the north side of Catskin Swamp, known as the "Casteen tract," and two tracts on the south side of the swamp, known as the "Watkins sixty-four-acre tract" and the "Watkins fifty-acre tract."

The case was tried in the Court below at December Term, 1900, and a verdict and judgment were rendered in favor of the defendant. The plaintiff appealed to this Court, where a new trial was awarded at February Term, 1901 (128 N. C., 301). The defendant filed a petition to rehear the case so far as the judgment affected the boundaries of the Casteen tract, and the petition was allowed. (129 N. C., 97.) The case was again tried in the Court below at March Term, 1903, and is now before us upon an appeal by the defendant from a judgment entered upon a verdict in favor of the plaintiff. Two

preliminary questions were presented in the lower Court and argued before us upon exceptions taken to the rulings thereon. They relate to the effect of the death of L. P. Dosh and to the decision of this Court when the case was reheard upon the plaintiff's right to recover, and will be passed upon after we have considered and decided the other questions raised in the appeal.

It will be convenient to take up and discuss separately the exceptions of the defendant applicable to each tract of land in the order in which the several tracts are mentioned in the case, that is, the "Casteen tract," the "Watkins sixty-four-acre tract" and the "Watkins fifty-acre tract," as there is some difference in the facts and principles relating to each of them.

At the last trial the defendant introduced in evidence a grant from the State to Daniel Atkinson, dated in 1840, and several mesne conveyances which it alleged connected the deed under which it claimed with said grant. Among these conveyances was a deed from Alexander Casteen to Ezekiel Chadwick, dated in 1859, which describes the land as follows: "Beginning at a yellow pine at the edge of said swamp, runs thence north four degrees, west 127 poles to a stake at the edge of the bay; thence with said bay to the head of Bear Branch; thence with Bear Branch to Catskin Swamp; thence with the run of said swamp down to the first station." After introducing this deed the defendant tendered witnesses for the purpose of proving adverse possession of the land under it continuously for twenty-one years. The evidence was excluded by the Court, upon the ground, as stated at the time, that the Casteen deed did not cover the land alleged to have been trespassed upon. The Court made this ruling because it was of the opinion that the calls of the deed stopped at the margin of the swamp and did not extend to the run. In this ruling of the Court we think there was error.

When this case was before the Court upon the rehearing it was held that the fourth or last call of the deed from Casteen to Chadwick so controlled the third call as to require that the latter should be extended to the run of Catskin Swamp. The Court further held that with this construction of the deed, and in view of the evidence and the probable finding of the jury, the plaintiff "must fail as to the tract north of the run," that is, the Casteen tract. We do not see why this was not a most explicit declaration of the Court as to the correct location of the boundaries of the deed, and this decision, we think, should have been recognized and followed by the learned Judge who presided at the trial. Not only was it so decided by this Court in this case, which makes it *res judicata* as to the parties to this litigation, but the decision is clearly in accordance with the law as previously laid down by this Court. Indeed the principle which governs in ascertaining the location of this particular call may now be considered as well established, if not elementary, in the law of boundary. A natural object or boundary called for in a deed, such as a river, creek or the run of a swamp, will control course and distance, and the line must terminate at it, however wide it may be of the course and distance specified. *Cherry v. Slade,* 7 N. C., 82. In this deed the third call is not for the run of the swamp, but for "Catskin Swamp," but the next and last call requires the last line to be co-terminus "with the run of the swamp," and it will be impossible to give effect to this call if the third line will not reach the run, unless that line is extended or a new and direct line is adopted so as to reach the run. It is just a simple application, as it seems to us, of the rule that the natural boundary must control and that a call which is less certain must yield to one which is more certain. *Campbell v. Branch,* 49 N. C., 313. It has repeatedly been held by this Court that where a natural boundary is called for, either expressly or by necessary implication,

as in this case, and the call stops short of it, the natural boundary should be reached by extending the line according to the course, if that can be done, and, if not, then by the most direct line to the nearest point on the natural boundary, disregarding, if necessary, the course and distance. *Heartsfield v. Westbrook,* 2 N. C., 258; *Sandifer v. Foster, Ibid.,* 237; *Cherry v. Slade, supra; Haughton v. Rascoe,* 10 N. C., 21; *McPhaul v. Gilchrist,* 29 N. C., 169; *Hays v. Askew,* 53 N. C., 226; *Literary Fund v. Clark,* 31 N. C., 58; *Campbell v. Branch, supra.* Where one of the calls is for an established line or natural boundary, and the next call is not to, but with, another established line or natural boundary, the latter must be reached by a direct line from the object at the end of the preceding call. Such were the calls in *Sandifer v. Foster, supra,* and in *Haughton v. Rascoe, supra.* In the former the call in dispute was for a white oak, thence along the river to the beginning; and in the latter the disputed call was for the Roanoke river, and then along the thoroughfare to the first station. In former case the Court held that a direct line must be run from the white oak to the river; and in the latter that a similar line must be run from the river to the thoroughfare. This is the principle governing in all such cases, always, of course, subordinating calls by course and distance to those by marked lines and natural boundaries, as the latter establish a more certain and reliable description. Where there is a call for course and distance, and the next call is not to, but with, a natural boundary, which the course of the preceding call does not lead to, the course and distance are disregarded and the line is extended directly to the natural boundary, as pointed out by *Battle, J.,* in *Campbell v. Branch, supra,* when correcting an inadvertence of the Court in *Literary Fund v. Clark, supra.*

Applying these principles to the facts of our case, we hold as a matter of law that the third line of the Casteen deed

should be run down Bear Branch to Catskin Swamp, which is a natural boundary, and then, if the run has not already been reached by a direct line to it *usque ad filum aquae*, and thence, according to the next call, with the run of the swamp. If the last call does not reach the first station, by following the run of the swamp, it must stop in the middle of the run at a point opposite the first station, and then a direct line must be run from that point to the beginning, which we think is in accordance with the decision in *Hays v. Askew*, *supra*, and the calls of this tract must be closed as we have indicated.

Watkins sixty four acre tract: This tract is described in the deed of Stephen Keys to O. F. Watkins, dated in 1868, as follows: "Beginning on Mulbery or Middle Branch, Benjamin Watkins' corner; thence north 59 east 3 rods to a pine; thence north 15 east 50 poles to a stake; thence north 10 west 108 poles to a stake; thence north 78 west 27 poles to a cypress at the edge of Merick's Creek; thence down said creek to the mouth of said branch; thence up the run of said branch to the first station, containing, by estimation, 50 acres more or less." The next preceding deed in the defendant's chain of title has the same description, except that it calls for a cypress at the edge of Catskin Creek instead of Merick's Creek, but there was evidence introduced by the defendant to the effect that the two names described one and the same creek. There was also evidence tending to show that Catskin Creek "meant the whole run and all the creek and lowland"; in other words, that Catskin Creek was identical with Catskin Swamp. We think, therefore, and so hold, that the defendant's deed should have been admitted, so that the jury could have determined upon the evidence offered by the respective parties, and under the instructions of the Court, as to what was in fact meant by the call for Catskin Creek or Merick's Creek. If the parties intended to call for the run of the creek, then the defendant's deeds cover the *locus in quo;* but if they intended to call for

the margin of the swamp, they do not. The Court, therefore, erred in excluding the defendant's deeds and in the instructions given to the jury on this part of the case.

The Court seems to have excluded these deeds upon the supposition that this Court had ruled at the former hearing of the case that when Catskin Swamp was called for it meant the edge of the swamp, and that the line should stop there. We do not so understand the former ruling. It is true that *Furches, C. J.,* in *Rowe v. Lumber Co.*, 128 N. C., 301, said that certain authorities cited by him tended to sustain the view "that a call to a swamp, and along a swamp, only goes to the swamp," but by reference to other parts of the opinion, especially at page 302, it will be seen that he was referring to a call for an object on the margin of the swamp, and not to a call for the swamp generally, for he says: "But the calls on the other two tracts on the east side are to points on the margin or banks of the swamp, and thence with the swamp." We cannot think that the learned Chief Justice intended to repudiate the principle laid down in *Brooks v. Britt*, 15 N. C., 481, that where there is a call for a swamp it is for the jury to say whether the margin or the run is intended, for he cited that case as one of the authorities in support of what he had said at page 304. The last expression of the opinion must be qualified and restricted by the particular facts of the case to which it referred.

We still adhere to the doctrine so well stated by *Gaston, J.,* in *Brooks v. Britt, supra,* that where a swamp is called for, whether the run in the boggy and sunken land, or the margin of such boggy and sunken land, is the call of the grant, depends "upon facts fit to be proved and proper to be passed upon by the jury"; so that in this case where there is such a call it must be governed by that principle, and likewise, where there is a call for Catskin or Catskin Swamp or Catskin Creek, whether the call refers to the run or the boggy or sunken land,

it must, under the same authority, depend upon facts "fit to be proved" and proper to be considered by the jury. This ruling will apply to all deeds not calling for the run in such manner as to leave no doubt that it was intended as one of the lines of the tract.

Watkins fifty acre tract: The calls of the deed for this land are as follows: "Lying on the south side of Catskin Swamp, containing 100 poles square, containing fifty acres, be the same more or less, lying and being on Catskin, beginning in the mouth of Blank's Bridge Branch, thence along said branch to Elsie Alexander's line; thence along said line to the Old Field Branch; thence said branch to Catskin; thence up the meanders of Catskin to the first station, with all woods, waters and every other appurtenances thereunto belonging." The question raised in regard to this tract is as to its proper location, and this depends largely upon the determination of its first or beginning corner. If that is once fixed it will not perhaps be difficult to ascertain its true boundaries. It begins at the mouth of the Blank's Bridge Branch, which flows into Catskin. The defendant contends that the mouth of the branch is at the run of the swamp, and the word "Catskin," as used in the clause, refers to the run; but, in view of the evidence in this case, we cannot decide as matter of law whether the contention of the defendant is right or not. The mouth of a stream is defined to be that part of it where its waters are discharged into another body of water. It cannot mean the place where the low-land of the branch meets the low-land of Catskin Swamp, as contended by the plaintiff. It must mean the place where the branch flows into some other body of water and loses its identity as a distinct stream, or where it ceases to have a channel of its own. If that point is at its confluence with the run of Catskin, then that is its mouth and the first corner of the tract; but if it is at the edge of the swamp, or at any other place in the swamp, then the latter

place is its mouth and the point of beginning. If the map was the only evidence in the case relating to this question we would say that the mouth of the branch is at the point designated on the map as "18," and that is where the branch joins the run, as it appears from the map that the branch empties into the run. But there is some evidence tending to show that Catskin Swamp is low and flat and that the branch "spreads out" at or near the edge of the swamp, where its waters mingle with those of the swamp, so that it cannot be identified as a separate stream, and that the run or channel of the swamp is some distance from the place where the branch empties into the waters of the swamp. It should therefore have been left with the jury to find, under proper instructions of the Court, where the mouth of this branch is, with directions that the place at which they find the mouth to be should be considered as the first corner in locating the boundaries of the tract. There seems to be no dispute as to the first two calls of the deed for this tract, but the plaintiff contends that the third call, which is "thence said (Old Field) branch to Catskin," should stop at the edge of the swamp, or, at least, that the matter should be left to the jury so that they can determine what is meant by "Catskin"—that is, whether the edge or the run of the swamp was intended. The defendant insists that the call should go to the run, but if as matter of law the run is not called for, then the jury should decide as matter of fact where the end of this line should be. We cannot say that either the edge of the swamp or the run is the objective point, but it must be submitted to the jury to ascertain, upon the evidence and under the instructions of the Court, where the end of the third line or the fourth corner of the tract is, and then a line should be run from this corner according to the call of the deed to the first station. It will be seen, therefore, that the true location of this tract is to be determined by the same general principle which was applied in the case

of the sixty four acre tract. When the call is at all ambiguous or uncertain it is always a question of fact for the jury to decide what was meant, and to fix the boundaries according to what they may find from the evidence, under the law as given to them by the Court, was the real intention of the parties to the deed.

In the trial below the Court by its ruling prevented the defendant from developing its case. The defendant should have been permitted to put its deeds in evidence and to show adverse possession under them, if it could do so.

What we have said leads to the conclusion that the Court erred in refusing to instruct the jury as asked to do in the defendant's second prayer, which refers to the tract north of Catskin, and the Court should have given the instruction contained in the defendant's ninth prayer, in which the Court was requested to submit the question as to the true location of the boundaries to the jury. It necessarily follows from this ruling that the Court's instruction to the jury to answer the issues in favor of the plaintiff, if they believed the evidence, was erroneous.

We have carefully examined the case of *Peebles v. Graham*, 128 N. C., 222, which has been called to our attention by plaintiff's counsel, and we do not think it is applicable to this case in the view we have taken of it.

In their briefs counsel for the respective parties, for the purpose of illustrating and pointing their argument, selected and referred to different deeds introduced by the defendant, the calls of which are somewhat unlike. It would unnecessarily lengthen this opinion if we should attempt to lay down the principles applicable to each deed under which the defendant claimed. The general principles we have stated, if properly applied, will, we think, be found sufficient to enable the jury, under the instructions of the Court, to locate the boundaries described in each of said deeds. If the defendant at the next

trial shows, and the jury find, that there has been adverse possession of any part of the disputed land which is covered by any one of the deeds upon which defendant relies, sufficient in law to bar the entry of the State at the time the grant issued to the plaintiff Rowe, this adverse possession under color of title will defeat the plaintiff's recovery as to that part of the land. *Rowe v. Lumber Co.*, 129 N. C., 97.

The defendant contended that the controversy as to the boundaries of the Casteen tract, which is north of the swamp, should not have been re-opened, as it was a matter which had been fully adjudicated and determined by this Court in its former decision on the rehearing. *Rowe v. Lumber Co.*, 129 N. C., 97. We agree with the defendant to the extent of saying that the Court below should have charged the jury in exact accordance with the principle of that decision, which was not done. The Court not only disregarded it, but charged in direct opposition to it when the jury were told to answer the fourth issue, as to the Casteen tract, "Yes." This completely nullified the principle upon which it was held by this Court that the matter should be decided, and the error arose, we have no doubt, from a misapprehension by the Court below of the true principle which had been settled by the former decisions in this case. But the defendant is mistaken in supposing that the decision upon the rehearing was *res judicata* in the sense that it completely eliminated that tract from the case and entitled the defendant, as matter of law, to judgment as to that part of the land. The issue submitted at the first trial was: Are the plaintiffs the owners of the land in controversy or any part thereof, and, if of any part, what part? The answer to that issue was "No." There were three tracts of land in dispute, and if an error was committed as to any of them this Court must of necessity give a new trial as to all, though there may have been no error committed as to one of them. This results from the form of the

issue. If a separate and distinct issue had been submitted as to each tract, and an error had been committed as to one only, the Court even in that case could have given a general new trial, but in its discretion could have restricted a new trial to the issue or issues as to which the error was committed. When the issue is general, embracing within its scope several distinct pieces of property or tracts of land, the new trial must be general, because the issue, and consequently the verdict, are in their very nature indivisible. This seems to have been expressly decided. *Beam v. Jennings,* 96 N. C., 82; *Holmes v. Godwin,* 71 N. C., 306. It is impossible to retain such a verdict as to one part and set it aside as to another part. The former decision on the rehearing is *res judicata* only in establishing this principle as the one which should govern in the trial of the case: that, as the call is "with Bear Branch to Catskin Swamp, thence with the run of said swamp down to the first station," the third line must be extended to run so that the run will be the next call or line of the tract. When the Chief Justice said the plaintiff must fail as to the tract north of the swamp he simply meant that upon the evidence in the case, if believed by the jury and if the correct principle of law is applied by the Court, the defendant must surely win; that is all. He could not under the circumstances have intended that the question should be taken from the jury and decided as matter of law in favor of the defendant.

It appeared that since this case was commenced L. P. Dosh, one of the plaintiffs, had died, and his devisee, M. V. Dosh, had been made a party to the action. The administrator of L. P. Dosh has not been made a party. Upon these facts the plaintiff requested the Court to charge that M. V. Dosh is not entitled to recover anything for her interest as devisee, as the trespass is alleged to have been committed before it was acquired. The Court refused to give the instruction

and the defendant excepted. The administrator of L. P. Dosh should be made a party, otherwise the plaintiff Rowe can only recover his share of the damages. *Winborne v. Lumber Co.,* 130 N. C., 32. But this error, if standing by itself, would only have involved a new trial, because, upon the defendant's own contention, there was only a recovery for more than should have been allowed, and, as we will order a new trial upon other grounds, the plaintiff, if so advised, may cause the administrator of L. P. Dosh to be made a party to this action, and this defect can thereby be remedied.

The defendant's motion to dismiss because the administrator of L. P. Dosh had not been made a party, which was made the first time in this Court, cannot be granted here, and could not have been granted even if it had been made in the lower Court, and as it was not the remedy provided by the statute. Clark's Code (3d Ed.), sec. 188; Acts 1887, ch. 389; *Wood v. Watson,* 107 N. C., 52, 10 L. R. A., 541; *Lynn v. Lowe,* 88 N. C., 478. The cases cited by the defendant for the position that a motion to dismiss may be made in this Court do not therefore apply.

Because of the errors which we have pointed out, the judgment must be set aside and a new trial awarded.

New trial.

JONES v. KRAMER.

(Filed November 24, 1903.)

WATERS AND WATER-COURSES—*Damages—Measure of Damages.*

In an action for damages for the temporary obstruction of a waterway, the measure thereof is the loss of crops occasioned thereby up to the time of the bringing of the suit.

ACTION by T. B. Jones and others against Kramer Bros. & Company and others, heard by Judge *Frederick Moore* and a jury, at November Term, 1902, of the Superior Court of HYDE County. From a judgment for plaintiffs the defendants appealed.

Rodman & Rodman, Small & McLean and *S. S. Mann*, for the plaintiffs.

George W. Ward, for the defendants.

CLARK, C. J. The features of this case are very much those of *Shaw v. Etheridge*, 48 N. C., 300, and *Hair v. Downing*, 96 N. C., 172. David M. Carter owned a large body of land in Hyde County, through which he cut a canal for drainage purposes, two or three miles long, ten or twelve feet wide and varying from two to seven or eight feet deep, to Alligator River. In 1867 he sold the upper or dominant part to the plaintiffs' ancestor, from whom it passed to the plaintiffs. The lower or servient part afterwards became the property of the defendants' grantors. In 1899 the canal was cleaned out and repaired at the joint expense of the plaintiffs and the lower riparian proprietors, one of whom, in November, 1899, sold the timber off his land to the defendants Kramer Bros. & Company, with privilege to use the canal for the purpose of floating the logs. The said company employed one Wat-

son to get out the timber, paying him so much per thousand feet, and directed him to put the logs into the canal. He began to do so about 16 August, 1900, and the summons herein issued 3 October, 1900. The plaintiffs contend that the work resulted in obstructing the canal and flooding the plaintiffs' land. The defendants' evidence shows that Watson acted under Kramer Bros. & Company's directions, and they are liable for his acts. *Davis v. Summerfield,* at this term.

If the plaintiffs were entitled to recover for permanent damages they could recover for any act of damage committed prior to 3 October, 1900 (date of summons), and any consequences flowing from such prior act down to the trial, but not for any injuries inflicted subsequent to that date. 2 Sutherland Damages (2d Ed.), sec. 1038. But that is not this case. The *locus in quo* where the logs were rolled into the canal and the obstruction was caused was not on the plaintiffs' land, and they announced in open Court that they did not claim for alleged injuries to the canal as distinguished from the land and crops, and further that they did not claim that there was any injury to the crop of 1900. The only damage shown, therefore, upon the plaintiffs' evidence is ponding water back, sobbing their land, and thereby injurying their land and crops in 1901 and 1902. This ponding back and injury were subsequent to the bringing of the writ, and damages for such injury cannot be recovered in this action. Woods Mayne on Damages, sec. 109. It is true the plaintiffs claim that the canal was obstructed and made shallower by the defendants' acts prior to the summons, but they admit no damages to them accrued therefrom prior to the writ. Such an obstruction did not necessarily cause the ponding back and water-sobbing the plaintiffs' land and injury to their crops in 1901 and 1902, for the obstruction might have been removed and the canal repaired before any ponding back and

injury in 1901. It was the failure to do this, and the consequent ponding back and injury in 1901 and 1902, which is the ground of action. It is immaterial when the obstruction to the canal was made, since the plaintiffs say they do not sue for that. There is no permanent damage to the plaintiffs' land either alleged or shown, for the water-sobbing can be relieved by removing the obstruction and cleaning out the canal so that it can drain the plaintiffs' land as before the obstruction was made.

The amended complaint avers that by reason of the obstruction to the canal complained of, "the waters which would have naturally flowed through the same from the land of the plaintiffs were obstructed and dammed and backed up on the land of the plaintiffs, greatly damaging said land of the plaintiffs, *causing said land to be less productive and prevented the proper drainage of the same.*" This lessened production is admitted not to have occurred in 1900. The obstructed drainage which caused it is an abatable nuisance, as in *Shaw v. Etheridge*, *supra*, and the measure of the damage accruing therefrom in 1901 and 1902 is the lessened production—the loss in the crops for these years. *Adams v. Railroad*, 110 N. C., 326. It would not be the diminished value of the land, since that will be restored by removal of the obstruction, which is not permanent, as in a case of a railroad embankment or other work of public improvement, as in *Ridley v. Railroad*, 118 N. C., 996, 32 L. R. A., 708; *Mullen v. Canal Co.*, 130 N. C., 496; or a mill-dam, as in *Burnett v. Nicholson*, 86 N. C., 99, in which the plaintiff was allowed to recover the annual loss from such permanent injury to the land down to the trial; and now the statute provides, as to railroads, a recovery once for all of the amount of such permanent damage, to avoid recurring suits every three years *ad infinitum*. But that principle has no application to damage sustained from an abatable nuisance.

Aside from this error as to the measure of damages, the Court should have further directed a verdict against the plaintiffs because the action was prematurely brought.

Error.

GRAHAM v. CARR.

(Filed November 24, 1903.)

RECEIVERS — *Commissions—Fees—Attorney and Client—The Code, sec. 379, subsec. 4—Acts 1901, ch. 2, sec. 88.*

The allowance of commissions and counsel fees to a receiver by the superior court is *prima facie* correct, and the supreme court will alter the same only when they are clearly inadequate or excessive.

ACTION by P. C. Graham, receiver, against J. S. Carr and J. S. Manning, heard by Judge *W. R. Allen* at March Term, 1903, of the Superior Court of DURHAM County. From a judgment for the plaintiffs the defendants appealed.

Boone, Bryant & Biggs, W. P. Bynum, Jr., and *J. W. Graham*, for the plaintiffs.

Guthrie & Guthrie and *Manning & Foushee*, for the defendants.

MONTGOMERY, J. Whether or not an allowance made by the Court below to the plaintiff, a receiver of an insolvent corporation, for his commissions and also for the amount allowed him to pay his counsel employed by him in the execution of his trust was suitable and proper is the matter presented to us by the appeal for consideration. Notwithstanding the allowance has been made by the Court below, it is conceded by the plaintiff that the adjudication was only

prima facie and that this Court has the power to review the action of the Court below and to set aside the same if allowed on a false principle, or if the amount is clearly inadequate or excessive to alter or modify the same. *Bank v. Bank,* 126 N. C., 531.

In the provisions of section 379, subsection 4, of The Code, receivers of corporations that have been dissolved, or become insolvent, or have forfeited their corporate rights, are given an allowance in the nature of commissions to be fixed by the Judge appointing them, not exceeding five per cent. on the amount received and disbursed by them. That statute being silent on the question of whether or not the receiver might be allowed any further compensation in the way of attorney's fees or other necessary help in the execution of his trust, it seems to have been deemed by the General Assembly necessary to enact a remedial statute upon the subject, and at its session of 1901, in chapter 2, section 88, it was enacted: "Before distribution of the assets of an insolvent corporation among the creditors or stockholders the Court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent. on receipts and disbursements, and the costs and expenses of administration of his trust, and the costs of the proceedings in said Court to be first paid out of said assets." It is not insisted by the defendant that the allowance made to the receiver in this case for commissions and attorney's fees were allowed on a false principle, and the only matter on that subject before us, therefore, is whether the amounts allowed are clearly excessive.

In considering the matter we shall keep in mind the declaration made by the Court in *Stewart v. Boulware,* 133 U. S., 78, that, "like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the Court below is treated as presumptively correct, since it

has far better means of knowing what is just and reasonable than an appellate court can have."

Before arriving at our conclusion that the allowance to the receiver for both his commissions and the amount allowed him for attorney's fees is excessive, we gave a most careful consideration to each and every part of the record, and it may not be amiss to summarize the main features of the case: In December, 1895, there was organized in the city of Durham a corporation under the name of the "Golden Belt Hosiery Company," the main stockholders being the defendants in this action and J. W. Smith, the largest creditor interested in this proceeding. Smith was the first president and was succeeded by Carr. The business of the corporation was a failure, financially, under both administrations, and in February, 1898, it was insolvent, the mill was shut down and negotiations commenced to sell out to another corporation in Durham called the Durham Hosiery *Mills*. Subsequently a sale was effected, and the Durham Hosiery Mills was to be reorganized under the name of the Durham Hosiery *Company*. The Golden Belt Hosiery Company received for its property, good-will, etc., $20,000 of first mortgage bonds of the Durham Hosiery Company and $19,000 par value of the stock. The defunct corporation, the Golden Belt Hosiery Company, had no other property besides the stock and bonds, which were the consideration for the sale to the new company, to pay a large outstanding indebtedness of over fifty thousand dollars. J. S. Manning was appointed a trustee and received the bonds and stock into his hands for the purpose of selling the same, that the proceeds might be applied to the payment of the debts of the old company. Manning, trustee, sold to the defendant Carr $14,000 of these bonds for their full face value, and the proceeds were applied to the payment of that amount of indebtedness of the Golden Belt Hosiery Company to the National Bank of Durham—Carr

and Smith both being securities for the payment of the debt. Afterwards Manning sold to the defendant Carr the remainder of the bonds, $6,000 worth, and the $19,000 of the stock of the new company. The sales were made for full value and in good faith, and the proceeds were applied to the admitted indebtedness of the Golden Belt Hosiery Company. The affairs of the new company, the Durham Hosiery Company, of which the defendant was a large stockholder and president, and in which Smith had no interest, greatly prospered from the start. In fact, the referee who was afterwards appointed in this case found as a fact that the capital stock was $40,000 and its bonded debt $40,000, and that a statement made by its book-keeper showed a profit in the year 1899 of between $23,000 and $25,000, and in the year 1900 a profit of between $21,000 and $22,000. The plaintiff was appointed receiver of the Golden Belt Hosiery Company, and on 4 January, 1900, commenced, through his attorneys, Boone, Bryant & Biggs, this action against J. S. Carr and J. S. Manning, trustee, to recover the $6,000 of bonds of the Durham Hosiery Company, the remainder after the sale of $14,000 worth to Carr, the defendant, and $19,000 of stock of the new company, on the ground that the sale was void for want of power in Manning, the trustee, to make it, and that the bonds and stock still belonged to the Golden Belt Hosiery Company. The plaintiff afterwards filed an amended complaint, in which he alleged that the defendant Carr had guaranteed the payment of a debt of the Golden Belt Hosiery Mills of about $6,000 to Mitchell & Co. and also a debt due to the Mayo Knitting Machine Company and one to the Farmers and Merchants Bank of New Bern—all guaranteed by Carr—and that he had unlawfully applied the proceeds of the sales of the $6,000 worth of bonds and $19,000 worth of stock to the payment of the Mitchell, Mayo Knitting Machine Company and Bank of New Bern debts, to the

exoneration of himself and to the wrong of other creditors of the Golden Belt Hosiery Company. After the pleading were in, the case was referred to A. C. Zollicoffer "to hear the evidence and decide the matters in controversy in this action, and make report of his findings and conclusions of law separately, and report the evidence taken before him to this Court." After the evidence was all in, the referee allowed the plaintiff to amend his complaint so as to ask for the recovery of the possession of the $14,000 of bonds of the Durham Hosiery Company sold by Manning to the defendant Carr. The referee made his report, in which he held as a matter of law that the plaintiff was not entitled to recover the bonds and stock sold by Manning to Carr, or the value thereof, and upon exception to the report by the plaintiff the Court reversed the findings of law of the referee, except the *third*. The referee, as his third finding of law, had held that the plaintiff was not entitled to recover possession of the $14,000 worth of bonds first sold by Manning to Carr, and the Court confirmed that finding. The plaintiff did not appeal from that part of the judgment of the Court.

On appeal to this Court it was decided that the judgment below should be reversed, except that part of it which affirmed the third conclusion of law made by the referee. The case is reported in 130 N. C., 271. The sale of the bonds and stock of the Durham Hosiery Company was held to be valid. The Court decided, however, that although neither the stockholders nor the directors of the Golden Belt Hosiery Company had any right to complain, because the proceeds of the sale of the stock and bonds were applied to the debts of the concern, and the stockholders being entitled to no part of the same until the debts of the defunct corporation should be paid, yet that the creditors of the defunct corporation, whether stockholders or not, had rights with regard to the payment of the debts which stockholders do not have. And the Court further

added: "As they (the creditors) have no lien on the assets of the corporation for the payment of their debts, and no right to have their debts preferred to those of other creditors, nor to object to the payment of other creditors in preference to the payment of their debts, if they are just debts, if such payments are made in good faith and without fraud, unless the debts so paid are due to a stockholder or officer of the corporation. When this is the case the law will not allow the stockholders and officers of the corporation to take advantage of their knowledge of the insolvent condition of the concern and their power to use and control the assets to pay their own debts, or to relieve them from special liabilities to the injury of other creditors." The Court further said there: "But as he, Carr, was *specially* and personally liable for the Mitchell debt and for the New Bern Bank debt, the law will not allow him to retain the advantage he got in having the Mitchell debt paid out of the proceeds arising from the sale of the $6,000 mortgage bonds, nor the advantage he got by having the application of a sufficient amount of the proceeds of the sale of the stock applied to pay the New Bern Bank debt to discharge it. While these sales were valid and the title to the bonds and stock passed to him, the plaintiff, who represents the creditors, should have judgment for the amount of the New Bern Bank debt and the amount of the Mitchell debt, and the defendant Carr will become a creditor to these amounts of the Golden Belt Hosiery Company, or any other debt that may be due to him. And this will not prevent him from claiming contribution against any co-surety on any residue that may remain unpaid."

When that decision was certified down to the Superior Court of Durham County the counsel of the defendant entered a motion in writing demanding that the form of the judgment should be in the nature of a set-off as to Carr's ascertained debt against the insolvent corporation; that the defendant

should not be charged with the receiver's commissions or with counsel fees either as an allowance or as a part of the costs, and that no execution be issued against Carr upon any judgment that might be entered against him, until it should be determined by the Court what deduction Carr was entitled to have made from the said judgment by virtue of his being a creditor of the Golden Belt Hosiery Company. A judgment was rendered by the Court "that the plaintiff receiver do recover of the defendant Carr the sum of $13,395.31, with interest on $10,612.93 from September 29, 1902, until paid, together with the costs of this action other than receiver's commissions and expenses and costs of referees and other charges, which are to be determined upon by charging it up to the receiver and refunding the party upon the settling of the receivership. It is further ordered that defendant Carr, on proof of any claim or claims he may hold against the Golden Belt Hosiery Company, shall share *pro rata* in the assets of the said company as other creditors who may have claims, in accordance with the discretion and opinion of the Supreme Court in that respect. It is further ordered that no execution issue on the judgment herein until the costs and the *pro rata* share to which each creditor is entitled shall be ascertained either by agreement or by referring it to the party to elect, and upon the *pro rata* of each being determined the judgment herein shall be credited with the *pro rata* of the assets due the defendant Carr, and thereupon execution may issue against said defendant."

At the next term of the Court a report was made by the receiver, which contained the amount claimed by him as commissions and the amount which he thought proper to be allowed for the attorneys employed in the case, and those amounts were allowed by the Court.

It is to be seen from the facts stated in this opinion that the most serious part of the litigation grew out of the alleged

invalidity of the sale of the bonds and stock of the Durham Hosiery Company, sold by Manning, trustee, to Carr, the defendant, as the property of the Golden Belt Hosiery Company. That was the prime cause of action, as appeared in their original complaint, and the plaintiff's demand for judgment was for the possession of the stock and bonds. The allegations in the amended complaint, in reference to the unlawful application of the proceeds of the sale of the $6,000 worth of bonds and $19,000 worth of stock to the Mitchell and New Bern Bank debts, seem to be an after-thought, and it was not until after the referee had heard the whole evidence that the plaintiff asked leave to amend his complaint so as to ask for the recovery of the possession of the $14,000 worth of bonds first sold to the defendant by Manning. Of course it cannot but be seen that the motion for that amendment was made after the referee had found that the profits of the Durham Hosiery Company had amounted to more than $23,000 a year upon a capital stock of $40,000, and of course it may be reasonably inferred that when the original complaint was filed it was not deemed necessary on the part of the plaintiff's counsel to demand the recovery of the $14,000 worth of bonds, as that amount went to pay a debt of the Golden Belt Hosiery Company to the Durham National Bank, for which debt both Carr and Smith were securities.

We see no evidence in the record that the defendant Carr has unnecessarily prolonged this litigation, or that he has done anything in the matter that a prudent business man would not have done for the protection of his property, if we may except from this statement the payment of the Mitchell and New Bern Bank debts out of the proceeds of the sale of the stock and bonds. The error which has been made in the allowance of commissions and expenses is due to a misunderstanding of the real import of the decision in this case by this Court at its February Term, 1902. In that decision

the validity of the sale of the bonds and stock by Manning to the defendant was upheld. The sale was fair and open and the price full, and the only thing required of the defendant was that he should account for the proceeds of the sale of the $6,000 worth of bonds and the $19,000 worth of stock, not as a clear recovery by the plaintiff of that amount of money to be paid to *other* creditors, but that it might be distributed to all of the creditors *pro rata*, of which creditors the defendant was greatly the largest. The direction to the receiver was that the debts due to all the creditors should be ascertained and the proceeds distributed *pro rata* among them, and that the indebtedness of the defunct corporation to the defendant should be credited on this judgment against him. That decision, understood in this way, was in effect a ruling that the true amount of recovery against the defendant Carr would be the difference between the judgment rendered against him, *i. e.*, $13,395.31, and the amount of his ascertained debt against the company. At the term at which the allowances were made (March Term, 1903) the debts due to the three creditors were as follows: To the Durham Dyeing Company, $1,592.40; to J. W. Smith, $4,403.58; and to the defendant Carr, $31,168.72. The *pro rata* part of the defendant Carr of the amount he was required to pay by the judgment was $11,728.79. He would then owe to the receiver, March 16, 1903, $2,101.11. That amount, plus $156.08 in the receiver's hands from another source, under an equitable view of the whole of this litigation, is the recovery upon which must be based the allowance of commissions to the plaintiff.

Upon a review of the whole matter we think the receiver is entitled to receive $225.71 as his commissions, the full amount allowed by the statute, and to receive for the use of the attorneys employed by him the sum of $950, as follows: $750 to be paid by him to Boone, Bryant & Biggs, and $100 each to John W. Graham and W. P. Bynum, Jr.; and these amounts

to be paid out of the *pro rata* shares of each of the creditors.

The judgment of his Honor *Judge McNeill* followed the decision of this Court.

The judgment of his Honor *Judge Allen* as to the allowances to the receiver as commissions and for counsel fees is as herein set forth—one-half the costs to be taxed against each part.

Modified and affirmed.

CLARK, C. J., and WALKER, J., did not sit on the hearing of this case.

TEAGUE v. SCHAUB.

(Filed November 24, 1903.)

CONTRACTS—*Restraint of Trade—Physicians and Surgeons.*

A contract between two physicians in a town that at a certain time one will locate elsewhere, if "the field is not larger" when the contract is to be executed than when made, is void because too indefinite.

WALKER and DOUGLAS, JJ., dissenting.

ACTION by R. J. Teague against O. P. Schaub, heard by Judge *W. R. Allen* at June Term, 1903, of the Superior Court of PERSON County. From a judgment for the defendant the plaintiff appealed.

Kitchin & Carlton, for the plaintiff.

Boone, Bryant & Biggs, W. T. Bradsher and *J. S. Merritt,* for the defendant.

MONTGOMERY, J. The plaintiff brought this action to enjoin the defendant, permanently, from practicing medicine

in the town of Roxboro and the territory adjacent thereto, for damages arising on an alleged breach of contract in which the defendant had agreed not to practice medicine in Roxboro and the adjacent territory, and for an amount alleged to be due by the defendant for money collected by the defendant belonging to the plaintiff and the defendant as partners in the practice of medicine. In the case on appeal it appears that all other matters in the action had been settled except those pertaining to the defendant's right to practice medicine in Roxboro, and the plaintiff's claim for the defendant's practicing there contrary to his agreement, and that these depended upon the construction of the agreement set out in paragraph 2 of the complaint. His Honor was of the opinion that the contract alleged in the complaint was indefinite as to territory and could not be aided by extrinsic evidence. That part of paragraph 2 of the case necessary to be referred to is as follows: "We, the undersigned, agree to continue the practice of medicine under the firm name of Teague & Schaub until December 1, 1901, Doctor Teague to receive 60 per cent. and Doctor Schaub 40 per cent. of collections for work done in general practice, except such time as Dr. Schaub shall have entire charge of said practice, then Dr. Schaub shall receive 75 per cent. of collections for work done during such time. Some time in December, 1901, Dr. Schaub agrees to take a review course and make application for a hospital course. If said Dr. Schaub gets appointment in a hospital he then releases the entire practice to Dr. Teague. If he (Schaub) does not get the appointment in hospital or the field is not larger then than now, said Schaub will locate elsewhere unless a new contract is made." On the back of the agreement the following was written: "Dr. T. further agrees to leave the field open to Dr. Schaub's entire care for a period of from two to four months. R. J. Teague, O. P. Schaub. Roxboro, N. C., April 4."

We concur in the view taken by his Honor. This case does not present that of a professional man selling out his good-will and practice to another for a valuable consideration. It is an attempt on the part of the plaintiff to force the defendant to leave the town of Roxboro and thereby to get rid of his competition under the provisions of the contract which we have recited. The defendant did not agree to leave Roxboro or the territory in which he actually practiced if he did not get the appointment in the hospital, but that he would leave if he did not get the appointment and in case the field should not be larger than when he made the contract. We cannot tell whether that word "field" meant the receipts from the practice, the number of patients or the extent of territory. It is indefinite in all three aspects, and we see no way of enforcing the contract. The word "Roxboro" written on the back of the contract, so far as the matter before us is concerned, under the case on appeal, means no more than that the contract was signed at that place.

No error.

WALKER, J., *dissenting.* This was an action to restrain defendant from practicing medicine in the town of Roxboro and to recover damages for a breach of the contract under and by virtue of which the plaintiff claimed the right to have the defendant enjoined.

It is necessary to an understanding of the matter involved that the entire contract should be set out. It is as follows:

"We, the undersigned, agree to continue the practice of medicine under the firm name of Teague & Schaub until December 1, 1901; Dr. Teague to receive 60 per cent. and Dr. Schaub 40 per cent. of collections for work done in general practice, except such time as Dr. Schaub shall have entire charge of said practice, then Dr. Schaub shall receive 75

per cent. of collections for work done during such time. Some time in December, 1901, Dr. Schaub agrees to take a review course and make application for a hospital course. If said Dr. Schaub gets appointment in a hospital he then releases the entire practice to Dr. Teague. If he (Schaub) does not get the appointment in hospital, or the field is not larger then than now, said Schaub will locate elsewhere, unless a new contract is made.

"It is furthermore agreed that if Dr. Schaub cannot secure an appointment by June 1, 1902, he remains here until that time, and if a contract between Teague and Schaub cannot be agreed upon by themselves they shall refer the matter to three men, one to be appointed by each of us, the third to be selected by the other two referees, and said Teague and Schaub shall abide by their decision. If Dr. Schaub remains here after taking hospital course until June 1 he is to receive 45 per cent. of the collections for work done in general practice during such time.

Roxboro, N. C., April 3, 1901.

R. J. TEAGUE,
O. P. SCHAUB."

And thereafter they amended it by adding on the back thereof the following: "Dr. T. further agrees to leave the field open to Dr. Schaub's entire care for a period of from two to four months. Roxboro, N. C., April 4. R. J. Teague, O. P. Schaub."

It was agreed in the Court below that all matters in controversy between the parties had been settled and that only one question is presented to the Court for its consideration, namely, whether "the contract is void because of indefiniteness as to the territory," and the Court below, upon the submission to it of this single question, held "that the said contract, in so far as it relates to the right to restrain the defend-

ant, is void for indefiniteness as to the territory and cannot be aided by extrinsic evidence," and the plaintiff's prayer for said relief was thereupon denied.

The Court below did not pass upon any question relating to the consideration of the contract, so as to determine whether there was a consideration sufficient to support it, nor did that Court take the view that this suit was "an attempt on the part of the plaintiff to force the defendant to leave the town of Roxboro and thereby to get rid of his competition under the provisions of the contract," which have been recited. There is nothing on the face of the contract, as I think, to justify the conclusion either that there was any such intent or purpose on the part of the plaintiff in bringing this action or that the contract is not founded upon a valuable consideration. If these matters were in controversy between the parties, the plaintiff clearly had the right to be heard by a jury, and to bring forward his evidence for the purpose of showing what the real facts of the case were.

The plaintiff's contention is that the defendant was in a measure his beneficiary, and that he, by reason of plaintiff's kindness to him having gained an advantage, now seeks to retain it and make use of it to the plaintiff's detriment in the community where the plaintiff had established a lucrative practice, and which, to advance defendant's interest and improve his then embarrassed situation, he had generously shared with him, the latter thereby acquiring the benefit of a practice ready to hand. It would be inequitable and against good conscience, as the law views the relation of the parties so established, to enable the defendant thus to deal with the plaintiff.

Those matters surely ought not to be considered upon an appeal from a judgment which, by agreement of the parties, presented but one question, which arose solely upon a consideration of the contract itself and which necessarily, by the

form of its submission to the Court, deprived the plaintiff of the opportunity of dissolving the facts bearing upon matters not involved in that question. The plaintiff should not be condemned before he is heard, and we should not consider and decide a matter which the parties have not seen fit to present to us. If I am permitted to refer to the pleadings for the purpose of showing the true nature of the controversy between the parties, I do not hesitate to say that there is abundant allegation on the part of the plaintiff, which, if sustained by proof, would have shown that there was a valuable and adequate consideration and that this suit was brought in good faith. If the plaintiff's allegations are true, he had been a benefactor of the defendant, and had extended aid and assistance to him when he most needed it. This Court decides against the plaintiff a question, as one of law, which must in its very nature involve a finding of facts which do not appear on the face of the contract.

If the plaintiff had supposed that the only question submitted to the Court by the agreement of the parties involved in its decision the matter as to the consideration of the contract and the object in bringing the suit, he, perhaps, would not have entered into the stipulation with the defendant, and I do not think we should undertake to decide questions which the parties have not called upon us to pass upon and which will at least place one of the parties at a disadvantage. I am not aware of any rule of law to the effect that the consideration of a contract, which is not required to be in writing, shall be expressed in the writing. My understanding is that it may be shown *dehors* the contract by oral evidence, and that the defendant, therefore, cannot agail himself of a want of consideration, unless that fact appears affirmatively in the contract itself. It seems to me that by a proper construction of the contract and an examination of the facts stated in the pleadings this appeal does present the case of a professional

man selling out his interest in the business of the firm for a valuable consideration, coupled with a covenant on his part to refrain from practicing his profession within a well-defined territory. This brings us to a consideration of the very question upon which the case was decided in the Court below.

In the second clause of the contract there is the following stipulation: "It is furthermore agreed that if Dr. Schaub cannot secure an appointment by June 1, 1902, he remains here until that time." Then follows the provision for the arbitration of their differences if the parties themselves cannot make an agreement. It is then further provided that "if Dr. Schaub remains here after taking the hospital course until June 1, he is to receive forty-five per cent. of the collections for work done in general practice during such time." The contract is dated at Roxboro, April 3, 1901, and signed by the parties. The writing on the back of the contract, which is quoted in the opinion of the Court, is also dated at Roxboro.

The question to be determined is to what does the adverb "here" refer. We are told by the lexicographers that the proper definition of the word "here," when used as an adverb, is: "In the place or region where the person speaking is; on this spot or in this locality." If this be its true meaning and significance, how can it be doubted for a moment that when it was used in the contract the parties referred to Roxboro? Besides, the plaintiff alleges in his complaint and the defendant admits in his answer that at the time the contract was executed the parties practiced medicine in Roxboro under the firm name of Teague & Schaub, and it is to be fairly inferred from the pleadings that they both lived in Roxboro at that time. I do not see how the conclusion can be avoided that the parties were referring to the place where they then were and where the contract was written, dated and executed.

The learned Judge who presided at the trial of the case was perhaps influenced too much by the consideration that the

practice of these two physicians extended beyond the boundaries of Roxboro and included within its limits "the territory adjacent thereto," as alleged in the pleadings, and also by the use of the word "field" in the addendum, which was written on back of the contract; but when we carefully consider those expressions it is perfectly clear that they do not refer to the territory in which the defendant agreed that he would not practice, because that is fixed in the body of the contract by what is agreed in the second clause.

It was said on the argument that the limits of Roxboro were indefinite, it not appearing to be an incorporated town. The maxim *id certum est quod certum reddi potest* answers this suggestion. If it is an incorporated town, then under the maxim just quoted that fact may be proved by oral evidence. If the uncertainty as to the locality be a defect in the contract, it is not a patent but a latent one. The description of the place is sufficient to let in extraneous evidence to make it definite and certain. But even if it is not an incorporated town, I don't think it necessarily follows that the contract is void for that reason, because every town, whether incorporated or not, has limits which are practically fixed or at least determinable. On the argument it was stated by plaintiff's counsel that Roxboro is an incorporated town and this was not denied. I don't mean to suggest that this is in any way conclusive upon the defendant as an admission by him, or even as legal evidence of the fact which could be considered in this Court, but it shows that the alleged defect can be cured by proof, and that the plaintiff should be permitted to establish the fact, if he can do so, in order to correct any ambiguity, if such there be in the contract, in this respect.

In the case of *Kramer v. Old,* 119 N. C., 1, 56 Am. St. Rep., 650, 34 L. R. A., 389, the defendants agreed "that they would not continue the business of milling in or in the

vicinity of Elizabeth City," and there was no reference in the contract to Elizabeth City as an incorporated town, and yet this Court held that the defendants would be enjoined from prosecuting the business in that town.

In my opinion the defendant has, in language too explicit for misconstruction, promised and agreed that, for a sufficient consideration received by him, he would not practice within the limits of the town of Roxboro, and that he should be enjoined from doing so in violation of that stipulation of the contract.

It is said that the defendant did not agree to leave Roxboro or the territory in which he actually practiced if he did not get the appointment in the hospital, but if he did not get the appointment *and* the field should not be larger than it was at the time the contract was made. The contract expresses this stipulation, not conjunctively but disjunctively, the word "or" and not the word "and" having been used by the parties. But this meaning is made perfectly clear when we refer to the next clause of the contract, in which the time when he should depart and cease to practice in Roxboro is fixed as June 1, 1902, and the condition is "if he cannot secure an appointment by that time." It is also to be noted that the expression used in the opinion of the Court refers to the month of December, 1901, while the expression in the second clause refers, as we have said, to June 1, 1902, with a different condition based, I presume, upon the extension of time to that date. The particular stipulation to be gathered from the contract is that at that time he should cease to practice his profession in Roxboro, and the plaintiff should thereafter have and enjoy the entire practice and good-will of the firm for a consideration growing out of the dealings between the parties before and after the making of the contract. This is, in substance if not in form, a sale by the defendant of his interest in the business to the plaintiff.

That contracts of this kind are not considered as being unreasonably in restraint of trade, and therefore not against public policy, has frequently been declared by the Courts, and they will be enforced specifically, and breaches thereof prevented by injunction, because no other remedy is adequate. *Cowan v. Fairbrother,* 118 N. C., 406; 32 L. R. A., 829; 54 Am. St. Rep., 733; *Kramer v. Old,* 119 N. C., 1, and cases cited. When the Court proceeds by injunction to restrain a breach of contract, it may well be doubted if the question whether there was a sufficient or adequate consideration is involved, the contract being then treated as a completed or executed one, and the only consideration required to support it being the same as would be sufficient at law in an action to recover upon the contract. *Kramer v. Old, supra.* Whatever the parties themselves have treated as a sufficient consideration will be so regarded by the Court in an action to restrain a breach of it. It is certainly not an executory contract, and the Court is not called upon to specifically enforce it, but merely to prevent a breach, and the jurisdiction of the Court arises out of the fact that there is no other adequate remedy. 24 A. & E. Enc. (2 Ed.), p. 852. Bispham, in his work on Equity, sec. 228, says: "The doctrine has been said to be that a restraint upon trade, in order to be good at law, must be, in the first place, *partial;* in the second place, reasonable, that is, such a restraint only as it may be necessary to protect the business of the party for whose benefit the contract was made; and, thirdly, founded on valuable consideration; although as to this last point it is now settled that the Courts will not enter into the question of adequacy of consideration, unless, perhaps, the inadequacy is such as to stamp the agreement as an unreasonable one." A Court recognized as one of high authority has said:

"A contract restraining one of the parties from the exercise of a trade within a limited locality, when there is rea-

sonable ground for the restriction, is valid. Inquiry will not be made into the adequacy of the consideration—its value will not be measured against the uncertain value of the right to carry on the trade or business—if it be reasonable, it is enough." Smith's Appeal, 113 Pa. St., 590.

In McClurg Appeal, 58 Pa. St., 54, which was a suit by one physician to restrain another from practicing in a certain locality, the contract was held to be reasonable and enforcible, and the defendant was enjoined. In discussing the question of consideration the Court says: "If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud upon the right of the party restrained or a mere voluntary contract, *nudum pactum,* and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether in any particular case the party restrained has made an improvident bargain or not. *Hitchcock v. Coker,* 6 Ad. & El., 438. This is not like a bill for the specific performance of an unexecuted contract, where, if the bargain is a hard one or founded on an inadequate consideration, a Chancellor will refuse to interfere and leave the party to his legal remedy."

This Court has sustained and enforced a contract substantially similar in its terms to the one now under consideration. In that case the defendant agreed not to practice the profession of medicine in the territory surrounding the town of Yadkinville. The Court held that there was "no rule by which the surrounding territory could be laid off," but that

the contract would be enforced and the breach of it enjoined as to the town of Yadkinville. It is true it appeared in that case that Yadkinville was an incorporated town, but the language of the Court shows that if there had been any means of ascertaining the limits of the locality, though they were not definitely fixed in the contract, the plaintiff would be entitled to relief. *Hauser v. Harding,* 126 N. C., 295. I do not see why the rule which prevails in cases of ejectment, where the question is one of boundary, should not govern in this case. There is no more reason why the contract should be certain as to the precise limits in the one case than that the deed should be certain as to the boundaries in the other, provided, always, that the limits or boundaries can be determined by oral evidence when there is no patent ambiguity. While I have discussed generally the merits of the case, because they are considered in the opinion of the Court, it does not appear to me that any question is involved except the single one which the parties have submitted, namely, "whether the contract is void because of indefiniteness as to territory," it being stated in the judgment that all other matters in controversy between the parties had been settled. It will be found by reference to the record that a jury trial was waived, and that this was the only question submitted to the judge for his decision. I think the judgment should be set aside and a new trial awarded, so that this question as to the limits of the town of Roxboro may be tried upon evidence introduced by the respective parties, either by a jury or by the Court, as the parties may agree.

DOUGLAS, J., concurs in the dissenting opinion.

SOSSAMON v. CRUSE.

(Filed November 24, 1903.)

1. INSTRUCTIONS—*Trial.*

It is improper to instruct the jury that "if they believe from the evidence" certain facts, then certain consequences will follow. The language should be: "if they find from the evidence."

2. ARREST—*Assault—Policeman—The Code, secs. 1124, 3810, 3811—Towns and Cities.*

A policeman who makes an arrest without a warrant outside the corporate limits of a town for the breach of an ordinance is guilty of an assault.

3. ARREST—*Assault—Excessive Force.*

The use of a pistol in attempting to arrest for a misdemeanor is excessive force.

4. ARREST—*Assault—Escape—Damages.*

Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person.

ACTION by J. W. Sossamon against John Cruse, heard by Judge *Thomas J. Shaw* and a jury, at May Term, 1903, of the Superior Court of CABARRUS County. From a judgment for the defendant the plaintiff appealed.

Montgomery & Crowell, for the plaintiff.
W. G. Means and *L. T. Hartsell,* for the defendant.

WALKER, J. This is an action to recover damages for an assault. At the time of the alleged assault there was an ordinance in force in the town of Concord prohibiting loud and profane swearing within its corporate limits, and defendant and Luther Biles were policemen of the town.

There was evidence tending to show that plaintiff and one Maxwell were fighting on the streets, when the defendant, who

had heard loud cursing, went to where they were and accused them of fighting, and arrested Maxwell, and the plaintiff then said that anybody who accused him of fighting told a lie, at the same time cursing the defendant, who struck the plaintiff with his "billy" and knocked him down. The defendant and Biles then jumped upon him, and defendant told Biles to "tap him again." In the struggle plaintiff took the "billies" from both of the policemen and escaped by running beyond the town limits. As he was running away the defendant and Biles pursued him and shot at him several times. Plaintiff ran to a point across the creek, and about one hundred yards beyond the corporate limits, when the defendant and Biles approached within five or six feet of him and demanded the possession of the "billies." The plaintiff refused to give them up, when the defendant shot him. The plaintiff fell and the defendant and Biles ran up and handcuffed him and carried him to the mayor's office, "where he was tried for using loud and profane swearing." On the other side there was evidence tending to show that the defendant acted lawfully and was entirely within his right when he first arrested or attempted to arrest the plaintiff, and that when he had escaped and was running away the defendant did not fire at him, though Biles did; that when the defendant asked plaintiff for the "billies" the latter advanced upon him in a threatening attitude, and the defendant then shot the plaintiff in self-defense.

The plaintiff requested the Court to charge the jury as follows: "If the jury find from the evidence that the plaintiff had violated the town ordinance against loud and profane swearing on the streets, and that the defendant had attempted to arrest him, and that plaintiff got loose and was running from defendant, and while so running defendant had shot at him with a pistol, then, in law, that would be an assault, and they should respond 'Yes' to the first issue." This instruction the Court refused to give, and the plaintiff excepted.

The Court charged the jury fully in regard to the power of a policeman to arrest for the violation of a town ordinance when the offense is committed in his presence, and to this part of the charge there was no objection by the plaintiff, but exception was taken to the following passages in the charge of the Court:

"1. If you are satisfied from the evidence that the defendant had reasonable grounds to believe and did believe that plaintiff was violating in his presence the ordinance prohibiting loud and profane swearing in the corporate limits of the town of Concord, and arrested the plaintiff, although the defendant was mistaken, he would be excused, and you are the judges of the reasonableness of the grounds upon which the defendant acted.

"2. If the jury believe from the evidence that the plaintiff was violating, in the presence of the defendant, the ordinance of Concord prohibiting loud and profane swearing within the corporate limits, and the defendant, not being actuated by ill-will, malice, hatred or malevolent purpose, arrested the plaintiff, and the plaintiff, not being out of the control of the defendant, attempted to escape, and to prevent such an escape the defendant fired his pistol, such firing would not constitute an assault."

Before discussing what we regard as the principal and vital question in the case we will call attention to the phraseology of the second passage taken from the charge of the Court. The jury is there told that if they "believe from the evidence" the facts therein recited, the acts of the defendant did not constitute an assault. This Court has referred to this form of expression as being open to the objection that the jury might believe that certain facts existed when they would not be willing to find that they did exist and that the law as given by the Court to the jury should be based not upon their belief merely, but upon the facts as found by them under the rule

of law as to the burden of proof and such proper instructions from the Court as will enable the jury to intelligently weigh and apply the evidence. *State v. Barrett,* 123 N. C., 753; *Wilkie v. Railroad,* 127 N. C., 203.

We are of the opinion that upon the evidence in the case the Court should have given the instruction asked by the plaintiff in his prayer. The exception to the refusal to give the instruction may conveniently be considered with the first of the above instructions given by the Court, to which exception was also taken. That instruction was, in substance, that if the plaintiff had been lawfully arrested, and, "not being out of the control of the defendant, had attempted to escape, and to prevent such an escape the defendant fired his pistol, such firing would not constitute an assault." This instruction, in view of what seems to be the uncontroverted facts in the case, was erroneous.

It appears that the defendant attempted to arrest the plaintiff without a warrant "for loud and profane swearing on the streets of Concord, in violation of the town ordinances," to use his own words. The plaintiff, according to his testimony, cursed the defendant and called him a liar, and thereupon the defendant knocked him down and an altercation between them ensued. According to the defendant's testimony, when he arrested the plaintiff for loud and profane swearing the latter resisted the arrest and struck the defendant twice, and the defendant then struck the plaintiff with the "billy" and got upon him and tried to put his twisters on his wrists. According to the testimony of both sides, the plaintiff overpowered the officers and escaped with their "billies." The defendant and Biles, the other officer, pursued him beyond the corporate limits. In this connection plaintiff testifies as follows: "When I ran they shot several times at me." The defendant, when within a few feet of the plaintiff, fired at him and the pistol ball struck him in the knee. He testified

that when he did so the plaintiff was advancing upon him, though the plaintiff testified that the defendant fired at him and shot him in the knee because he refused to give up the "billies." The evidence therefore tended to show that the plaintiff had escaped and was flying from arrest when he was fired upon by the defendant and Biles, and that when the defendant shot him in the knee he had succeeded in escaping from his pursuers and was not then, nor was he at any time when the pistols were fired, within their reach or under their control.

It is provided by law that every person present at any riot, rout, affray or other breach of the peace shall interfere to suppress and prevent the same, and if necessary for that purpose shall arrest the offenders. The Code, sec. 1124. It shall be lawful for city and town constables to serve all civil or criminal process that may be directed to them by any court within their respective counties under the same regulations and penalties as prescribed by law in the case of other constables. The Code, sec. 3810. A policeman shall have the same authority to make arrests and to execute criminal process within the town limits as is vested by law in a sheriff. The Code, sec. 3811.

It will be observed that the power of policemen to make arrests, except when they are acting in obedience to the process of a court under section 3810, is confined to the corporate limits of the town. We do not think, therefore, that the defendant had a right to pursue the plaintiff beyond the town limits in order to arrest him after he had escaped. When the prisoner had escaped from the custody of the officer he certainly had no more power or authority to re-arrest him than he had when the original arrest was made, and his power in the latter case could only be exercised within the town limits. *State v. Sigman*, 106 N. C., 728; *State v. Stancill*, 128 N. C., 606; *Wright v. State*, 44 Texas, 645. If he had

failed in his first attempt to arrest the plaintiff and the latter had escaped beyond the town limits, the defendant could not have pursued him for the purpose of making the arrest, and it follows, therefore, that his pursuit of the prisoner beyond the limits after he had successfully resisted arrest and escaped was unlawful. *State v. Freeman*, 86 N. C., 683, and cases *supra*.

But assuming, for the purpose of the argument, that he could lawfully have pursued the defendant beyond the corporate limits in order to effect his arrest, he clearly had no right to use excessive force, and the use of a pistol, which is a deadly weapon, in attempting to arrest one charged only with the commission of a misdemeanor is excessive force. In such a case the life of the offender must not be imperiled when he is only flying from arrest and trying to escape. This doctrine is well settled. McClain, in his work on Criminal Law, sec. 298, says: "In attempting to make an arrest, where the person to be arrested, instead of resisting, seeks to make his escape, there is a difference, depending on the gravity of the offense for which the arrest is being made, as to whether the officer may do an act calculated to take life. If the offense for which the arrest is being made is a felony the person (whether an officer or not, provided he is lawfully arresting) may take life if necessary in order to effect the arrest. But if the offense for which the arrest is being made is a misdemeanor there is no right to take life, and the person seeking to make the arrest will be guilty of a crime in doing so. As to resisting the escape of a prisoner under arrest or in confinement, it seems that the officer may resist so far as necessary, and if the attempt is so violent as to make it necessary to take life in preventing such escape the officer will be justified in doing so, whether the prisoner is under arrest for felony or misdemeanor, or even (at common law) merely under civil process. It is probable, however, that even as to preventing

escape the officer is justified in taking life only to prevent escape for felony, or where, the offense being a misdemeanor, in resisting force with force if his own life is put in peril, and not where he takes life merely to prevent escape of one charged with a misdemeanor. But the officer will be justified in taking life only where he has reasonable ground to believe, and does believe, that it is necessary in making the arrest or preventing escape or defending himself, and the jury must judge of this on the facts."

We find the same doctrine laid down in Wharton on Criminal Law, secs. 404 and 405: "Unless it be in cases of riots it is not lawful for an officer to kill a party accused of misdemeanor if he fly from arrest, though he cannot otherwise be overtaken. Under such circumstances (the deceased only being charged with a misdemeanor) killing him intentionally is murder (at common law); but the offense will amount only to manslaughter if it appear that death was not intended. Where resistance is made, yet if the officer kill the party after the resistance is over and the necessity has ceased, the crime will at least be manslaughter. And it is manslaughter for an officer to kill a prisoner in prevention of an escape when the escape could be prevented by less violent means. * * * The reasonable rule is that when a man flies from arrest, the charge being a mere trespass or an offense equivalent to a trespass, to kill him in prevention of an escape is at least manslaughter. It is otherwise, supposing the arrest to be duly authorized and notice duly given, where the offense is of high grade, assailing life or public safety."

This Court, in *State v. Sigman, supra,* referring to the distinction in this respect between an arrest for felony and one for a misdemeanor only, has recognized what we have already stated and what we have quoted from the books as the law in such cases, and relies upon *Hale, Foster, Wharton* and *Bishop* as authority. "A very different principle," says

the Court, "prevails where a party charged with a misdemeanor flees from an officer who is entrusted with a criminal warrant or *capias* in order to avoid arrest. The accused is shielded in that event, even from an attempt to kill with a gun or pistol, by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offence when it is probable that he can be arrested another day and held to answer." 1 Bishop Cr. Pr., 616. An officer who kills a person charged with a misdemeanor while fleeing from him is guilty of manslaughter at least. 1 Wharton's Cr. Law, sec. 5 (9th Ed); 2 Bishop's Cr. Law (7th Ed.), sec. 649.

After an accused person has been arrested an officer is justified in using the amount of force necessary to detain him in custody, and he may kill his prisoner to prevent his escape, provided it becomes necessary (1 Bishop's Cr. Pr., sec. 618), whether he be charged with a felony or a misdemeanor. But when a prisoner charged with a misdemeanor has already escaped the officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest; and if in the pursuit he intentionally killed the accused it is murder, and if it appear that death was not intended the offense will be manslaughter."

Applying these principles to the facts of our case, we must hold that the defendant had put himself, as an officer, beyond the pale of the law's protection when he pursued the plaintiff beyond the town limits and fired at him with his pistol, whether he intended to kill him or not. Such use of the pistol as would have made the defendant guilty of manslaughter if he had killed the plaintiff was an assault, even if no actual injury was done. *State v. Sigman, supra.* In the language of *Justice Foster,* "It behooves the officers of the law to be very careful that they do not misbehave themselves

in the discharge of their duty, for if they do they may forfeit its special protection." Foster's Crown Law, p. 319.

It may be that the defendant will be able to show that he acted in self-defense when he shot the plaintiff in the knee, and that while he may not have been justified as an officer in inflicting the wound he was so justified as an individual, as the pistol was fired only when in self-defense. But we will not pass upon this question, as it is not necessary to do so, and, indeed, it is not clearly presented in the record. We can only say that for the reasons we have given the Court should have instructed the jury as requested to do by the plaintiff, and that the charge of the Court to which we have already referred was erroneous. We can see no objection to the other part of the charge to which exception was taken. *Neal v. Joyner*, 89 N. C., 287; *State v. McNinch*, 90 N. C., 695.

The verdict must be set aside and a new trial awarded, and it will be so certified.

New trial.

PARISH v. EAST COAST CEDAR COMPANY.

(Filed November 24, 1903.)

DUE PROCESS OF LAW—*Constitutional Law—Forfeitures—Vested Interests—Taxation—The Code, sec. 2522—Acts 1889, ch. 243—Const. N. C., Art. 1, sec. 17—Const. U. S., Fourteenth Amendment, sec. 1.*

An act which provides that where the owner of swamp land, his heirs or assigns, fail to pay all arrearages of taxes levied and assessed thereon, or which ought to have been levied on or before a certain date, and that such land shall be forfeited to and vested in the state, without any judicial proceeding, is unconstitutional.

ACTION by J. S. Parish against the East Coast Cedar Company and others, heard by Judge *Frederick Moore* at Novem-

ber Term, 1902, of the Superior Court of DARE County. From a judgment for the defendant the plaintiff appealed.

Shepherd & Shepherd and *W. M. Bond,* for the plaintiff.
E. F. Aydlett and *F. H. Busbee,* for the defendant.

DOUGLAS, J. In this cause, a jury trial being waived, the following facts are found by the Court:

"1. Before the bringing of this action the State Board of Education, for value, executed and delivered to plaintiff a deed conveying in fee-simple to plaintiff the tract of land described in the complaint, said deed being properly probated and registered before this action was started in the county in which said land is situated.

"2. That all of said land is swamp land, containing more than two thousand acres in that body, and plaintiff has no source of title to it except by virtue of said deed.

"3. That after plaintiff procured said deed, before the suit was started, defendants entered upon said land and cut and removed therefrom timber trees worth —— dollars, under deed purchased by defendant before said Board made deed to plaintiff.

"4. That about one hundred years ago said land was granted by the State to one Hunnings, which grant was registered in the county said land was in as soon as same was issued.

"5. That the taxes for several years before and up to and including the year 1891 have never been paid to the State upon said lands. Defendant owns whatever title the heirs of said Hunnings had at the time their deed was made to defendant.

"6. That said Board of Education had never had said land surveyed nor exercised any control over it before making said deed to plaintiff.

"Defendants admit that plaintiff owns said land if said

deed was sufficient to convey the title—that is, if said Board of Education owned said land, under The Code, Vol. II, ch. 15, and laws amending same, then plaintiff was owner of same at the time defendants cut timber from same.

"Plaintiff admits that defendants own said land if said deed to plaintiff did not in law convey a good title to plaintiff."

Upon this state of facts the Court below adjudged that the defendants were the owners of the land in question.

The single question presented for our consideration is the constitutionality of chapter 243 of the Laws of 1889, amending section 2522 of The Code. Section 2522, before the amendment, was as follows: "Any person, his heirs or assigns, having at any time obtained a grant from the State for any swamp lands which have been surveyed or taken possession of by the State Board of Education or their agents, and shall not have regularly listed the same for taxation and paid the taxes due thereon to the persons entitled to receive the same, such grantee and his heirs or assigns shall forfeit and lose all right, title and interest in the said swamp lands, and the same shall *ipso facto* revert to the State and be vested in the said Board upon the same trusts as they hold other swamp lands, unless such person, his heirs or assigns shall have paid to the sheriff of the county in which said lands lie, prior to the 21st day of January, one thousand eight hundred and forty-four, all the arrearages of taxes due on said land, with interest thereon, from the time the taxes ought to have been paid."

The part of the amending act necessary for our present consideration is as follows: "Upon the failure of any such grantee or grantees, their heirs or assigns, to pay to the sheriff or other person authorized to receive the same all arrearages of taxes which were levied and assessed, or *which ought to have been levied and assessed,* with lawful interest due thereon, on or before the said 21st day of January, 1890, all

the right, title and interest in said swamp land belonging to or vested in such grantee or grantees, their heirs or assigns shall become forfeited and vested in the State Board of Education; and no suit, action, proceeding, order, decree or judicial determination shall be necessary to such forfeiture, but it shall be absolute at the expiration of the time herein prescribed, upon the non-payment of the aforesaid taxes and interest." The *italics* are ours. This act is apparently intended, at least by the draftsman, to evade the construction placed upon the old act by the cases of *Phelps v. Chesson,* 34 N. C., 194, and *Land Co. v. Board of Education,* 101 N. C., 35. In the former case this Court held that, although the act provided that the lands should "*ipso facto* revert to and be vested in the State" unless all arrearages of taxes were paid within twelve months of the passage of the act, the said lands were not forfeited in the absence of any procedure to declare and enforce forfeiture. The Court, by *Pearson, J.,* says: "Admit that this act has the force of inserting in the original grant a condition that if the taxes are not paid when due, but shall at any time be in arrear, 'the land shall *ipso facto* revert to and be vested in the State,' according to the well-settled principles of law if the taxes were in arrear at any time the estate created by the grant would not be defeated and revert to the grantor unless some solemn act was done by which to enforce the condition; for the estate, having commenced by a solemn act, viz., a *grant,* must be defeated by an act equally solemn, upon the maxim of the common law, *'eo ligamine quo ligatur.'* If a feudal tenant failed to perform the services his estate was not defeated until the lord had judgment in a writ of *cessavit.* If a subject incurs a forfeiture by committing treason his estate is not defeated until 'office found.' If a feoffment is made on condition, and the condition is broken, the estate continues until it is

defeated by the entry of the feoffor or his heirs. Coke on Littleton, chapter on Conditions. The law books teem with cases fixing the principle that an estate once vested cannot be defeated by a condition or forfeiture without some act on the part of the grantor or his heirs by which to take advantage of the condition or forfeiture, even when the words of the condition are 'the estate shall therefore be void and of no effect,' which words have the same legal import as *'ipso facto* void.' "

The Court expressly declined to pass upon the constitutionality of the act on the ground that it became unnecessary in view of the construction placed upon it. In *Land Co. v. Board of Education,* 101 N. C., 35, the Court, in approving the interpretation placed upon the statute in Phelps' case, says: "The counsel for the appellant seems to question the correctness of that interpretation. We think it is reasonable and just, and it seems to us fully warranted, certainly by the spirit and reason of the statute. It is not to be presumed or merely inferred that the Legislature intended to deprive the grantee of his estate without affording him opportunity in some affirmative way that actively puts him on notice to defend his right if he shall see fit, and an intention to do so could only appear by clear and explicit terms, leaving no doubt as to such intent, and we forbear to say here whether such an enactment would or would not be of force for any purpose. The reasonable inference is that the Legislature intended to allow such opportunity, and it sufficiently appears that it has done so."

The Court again declines to pass upon the constitutionality of the statute in the following significant words: *"We forbear to say here whether such an enactment would or would not be of force for any purpose."*

The present statute is so framed as to require an explicit adjudication of its constitutionality. Courts naturally and

properly avoid passing upon the constitutionality of an act of the law-making power if substantial justice can be attained in any other way; but in the face of an imperative duty we are forced to declare it unconstitutional, as being not only in violation of the express provisions of that instrument, but subversive of natural and antecedent rights which the Constitution itself was adopted to protect. It is clear to us that in *Phelps v. Chesson* and *Land Co. v. Board of Education, supra,* this Court construed the words *"ipso facto"* in the manner it did as the only constitutional construction of which the act would permit. The very fact that the Court declines to express any opinion as to the constitutionality of an act, and then proceeds to place upon the act a construction that renders it practically harmless, is a very strong intimation of its unconstitutionality when construed in any other manner. Thus, while those cases are not direct authorities for our decision in the case at bar, they are strongly persuasive in their tendency. The Constitution of this State, in Art. I, sec. 17, says that "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land." Section 1 of the Fourteenth Amendment to the Constitution of the United States contains the following provision: "Nor shall any State deprive any person of life, liberty or property without due process of law." We refer to the Federal Constitution only by way of analogy, as we base our decision in the case at bar exclusively upon the provisions of the Constitution of this State.

It is well settled that the phrases "due process of law" and "the law of the land" mean identically the same thing, and the authorities on each are cited interchangeably. The latter expression is taken from section 39 of *Magna Charta,* which is repeated in chapter 29 of the Charter of Henry III.,

confirmed by Edward I. It is difficult to define what is due process of law, but perhaps the definition most largely quoted is that of Mr. Webster in his argument in the Dartmouth College Cases, which is as follows: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land." Mr. Webster, after giving the above definition, continues as follows: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the Legislature. There would be no general permanent law for courts to administer or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country." It is significant that he includes "acts of confiscation" and "legislative forfeitures" among the intolerable evils to be avoided. The result of the best modern authorities is well stated in 10 Am. & Eng. Enc. of Law (2d Ed.), as follows: "Though all the preceding definitions throw much light on the meaning of due process of law, the most satisfactory definition is that it secures to every one the right to have notice of any proceeding by which his rights of life, liberty or property may be affected, and to be afforded an opportunity to defend,

protect and enforce such rights in an orderly proceeding adapted to the nature of the case."

In *Henderson v. Wickham,* 92 U. S., 259, the Court says: "In whatever language the statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect." Again, the Court says, in *Simon v. Craft,* 182 U. S., 427: "The essential elements of *due* process of law are notice and opportunity to defend. In determining whether such rights are denied we are governed by the substance of things and not by mere form." It is useless to cite further authorities as to what is *due* process of law, when the act itself specifically provides that *no process* whatever shall be necessary. It expressly provides that: *"No suit, action, proceeding, order, decree or judicial determination shall be necessary to such forfeiture."*

The act contains another most singular provision, which of itself would be fatal to its validity were there no other objections. It provides that this forfeiture of the land shall become absolute upon the failure to pay not only such taxes as were actually levied but also all those "which *ought to have been levied and assessed.*" Whether the Legislature could pass a valid act providing for the forfeiture of land for nonpayment of taxes *thereafter* lawfully levied is a question not before us and on which it would be useless to express an opinion. It must be borne in mind that this act does not pretend to provide for the collection of back taxes, but imposes a forfeiture for the failure to pay back taxes. The principles are essentially different. The first simply provides for the collection of the debt, while the other is in effect a confiscation of the property for an antecedent omission of duty. Let us see what would be the practical operation of the act if enforced. There is no limitation as to how far back the act will operate, as it provides that the land shall be forfeited unless *all* arrearages of taxes are paid. This would appa-

rently take it back to the date of the grant, which in the case at bar was issued about one hundred years ago. If the taxes for 1804 had not been paid the land would have become absolutely forfeited to and vested in the State Board of Education on the first day of January, 1890, in spite of the fact that the taxes for all the other eighty-seven years might have been paid in full. The owner, who might have been in actual possession personally and through those under whom he claimed for a hundred years and may have paid all subsequent taxes, would be utterly helpless, as no statute of limitation would have had time to run against the State since 1890. He would be at the mercy of the Board of Education, or perhaps even worse than that if, forsooth, some neighbor who coveted his little vineyard had obtained a deed for his land, or even an option thereon.

Of course we must take the act as we find it, and declare it unconstitutional upon its face, but we cannot do the Legislature the injustice of supposing that it ever intended to legalize such unjust possibilities by an act passed in the closing days of its session.

Our attention has been called to the case of *State v. Sponangle,* 45 West Va., 415, 43 L. R. A., 727. We have carefully examined that case, in which there is a learned and elaborate opinion by a distinguished jurist. We think there is a substantial difference between the statutes; but, in any event, wherein that opinion differs from the views herein expressed, it fails to meet our approval. The distinction between a forfeiture and a sale for taxes must be borne in mind, as they are essentially different in nature and result. A sale is the collection of a debt, is public, is made only after notice, and passes no title until the deed is made, of which the owner must have additional notice. In the meantime he can pay his taxes and keep his land. On the contrary, a forfeiture works

secretly and immediately, without notice to the owner and without opportunity of redemption.

Judgment affirmed.

JOINES v. JOHNSON.

(Filed November 24, 1903.)

1. EXCEPTIONS AND OBJECTIONS—*Instructions—Trial.*

An exception to a charge which does not specify the ground of objection is too general to be considered.

2. DEEDS—*Vendor and Purchaser.*

An endorsement on the back of a deed, properly acknowledged, that for value received the grantee in the deed conveys to A all the right and title vested in him by virtue of the said deed, conveys no title.

3. CONTRACTS—*Deeds—Harmless Error—Negotiable Instruments.*

Where in an action on a note executed pursuant to a contract to convey land, the jury finds that plaintiff did not contract as alleged by defendant, the refusal to instruct that if plaintiff did not complete his contract with defendant, and defendant demanded a rescission, plaintiff could not recover, is not harmful to defendant.

4. INSTRUCTIONS—*Evidence.*

The trial judge should not give an instruction not supported by the evidence.

5. ACKNOWLEDGMENTS—*Deeds—Justices of the Peace—Mortgages.*

Where plaintiff executed a deed to a third person and accepted a mortgage from defendant to secure the purchase money, the plaintiff, acting as a justice of the peace, was not incompetent to acknowledge a transfer by such third person of his deed to defendant.

JOINES *v.* JOHNSON.

ACTION by W. Joines against H. Johnson, heard by Judge *Walter H. Neal* and a jury, at June Term, 1903, of the Superior Court of WILKES County. From a judgment for the plaintiff the defendant appealed.

No counsel for the plaintiff.
T. B. Finley, for the defendant.

WALKER, J. This action was brought to recover the amount of a note and to foreclose a mortgage given to secure its payment. The plaintiff alleged in his complaint that on August 30, 1894, the defendants made and delivered to him a note under seal for the sum of $100 due August 1, 1896, and to secure its payment they executed a mortgage upon the land therein described, and that no part of the note has been paid; he therefore demands judgment for the amount of the note and for the foreclosure of the mortgage. The defendants in their answer deny the execution of the note, but admit the execution of the mortgage and aver that it was given upon the condition that the plaintiff should make them a deed for one of the tracts of land described in the mortgage, which contains twenty acres. The plaintiff refused to make the deed, and upon demand refused also to return the mortgage.

The plaintiff introduced evidence which tended to show that the defendants executed the note and mortgage and that no part of the note had been paid. That on or about August 30, 1894, plaintiff contracted to sell and did sell and convey a tract of land to one E. L. Billings, and as part payment of the purchase money he agreed to accept and the defendants agreed to give their note, secured by the mortgage, in the sum of $100, Billings having agreed for that amount to sell to the defendants a tract of land the title to which was then in Billings, and that plaintiff, who was a justice of the peace, wrote on the back of the deed to Billings the following transfer:

"For value received of Hardin Johnson, I convey to him all the right and title vested in me by virtue of the within deed. August 1, 1894. E. L. Billings (Seal). T. J. Billings (Seal)."

The plaintiff, as a justice of the peace, then took the acknowledgment of Billings and his wife and the privy examination of Mrs. Billings. There was no agreement that plaintiff should make the defendants a deed or that he should see that Billings made the deed to them for the land. The deed, with the endorsement thereon, was delivered to the defendant in the plaintiff's presence, the parties believing at the time that the written transfer was sufficient to pass the title to the defendants. Billings has never paid to the plaintiff anything for the land.

When the plaintiff proposed to introduce the deed to Billings and the endorsement thereon written by himself, together with the acknowledgment and privy examination, the defendant objected, and the objection being overruled and the papers admitted, the defendant excepted on the following grounds: "1. That said endorsement was not a deed and could not be held a sufficient consideration for the execution of the note and mortgage. 2. That the acknowledgment and privy examination were invalid because the plaintiff was interested in the transaction."

The defendants introduced evidence tending to show that they did not execute the note, but that they did execute the mortgage, and that in consideration thereof Billings agreed to execute and the plaintiff agreed to see that Billings did execute to the defendant Hardin Johnson a good and sufficient deed with covenant of warranty for the land that the defendants had bought from Billings, which contained twenty acres, and that neither the plaintiff nor Billings had complied with the agreement.

The defendant's witness, E. L. Billings, testified that he

had agreed to make to the defendants a deed for the twenty-acre tract, and thought that he had done so by the delivery of the deed from the plaintiff to him and the written transfer and probate which are on the back of the deed; that if it is not a good deed he is still willing to make one that will be valid and sufficient to transfer the title to the defendant.

By consent of the parties issues were submitted to the jury by the Court, which, with the answers thereto, are as follows:

1. Did the defendant execute to the plaintiff the note sued on in this action? Yes.

2. If the defendant executed said note, in what amount is he indebted to the plaintiff? One hundred and three dollars and sixty-one cents, without interest.

The Court charged the jury that if they found by the greater weight of evidence that the plaintiff agreed to convey the land to the defendants, or that he would see that Billings conveyed it, and that the defendants received a good title to the same, they should answer the second issue "Nothing"; that the endorsement on the deed, with the acknowledgment and privy examination, did not constitute a conveyance, but was only such a contract or covenant as could be enforced by the defendants against Billings and his wife; and further, that if they found from the evidence the contract was as claimed by the defendants, then the endorsement was not a compliance with the contract as made between the parties. It appears in the case that "the defendant excepted to the foregoing charge," without stating the particular grounds of the exception.

The defendants requested the Court to charge the jury as follows:

1. That unless plaintiff complied with his contract, if any, made contemporaneous with the execution of the mortgage, he could not recover in this suit.

2. That the transfer on the back of the deed from Billings does not pass a good and valid title to the defendant Johnson.

3. That if Joines did not complete his contract with the defendant Johnson on the day of the trade, and by reason of this the defendant demanded a rescision of the contract, then the plaintiff is not entitled to recover.

4. That if the plaintiff failed to complete the trade agreed upon when the defendant was in position to comply with his part of the trade, he cannot compel the defendant to comply with said contract when the defendant is not now in a financial condition to do so, if said condition was caused by the plaintiff's wrong or neglect.

The Court gave the instruction asked in defendant's second prayer, and refused to give those contained in the third and fourth prayers. In reference to the first prayer it is stated in the case "that the Court did not give paragraph 1 of the defendant's prayers in the words used, but tried to state, and thinks it did state, in the charge as heretofore given the contention which is presented in said prayer."

The defendants excepted to the refusal of the Court to give the instructions as contained in prayers 1, 3 and 4. Judgment was entered on the verdict, and the defendants appealed.

The exception to the charge is rather too general to be considered by this Court. The charge embraces more than one proposition, and one at least was favorable to the defendants. The exception should have specified the ground of objection. *McKinnon v. Morrison,* 104 N. C., 354. But, waiving the generality of the exception, we think the charge was in itself correct and was sufficient to present the defendant's contention. The execution of the note was denied by the defendant and the jury found the issue based upon that denial in favor of the plaintiff. The only other matter of defense related to the transaction in regard to the deed from Billings. The defendants testified that the plaintiff had promised to see that

a good title was conveyed by Billings, and the Court instructed the jury that if they found this to be true they should find against the plaintiff upon the second issue. If they had so found it would have defeated the plaintiff's right of recovery. We cannot therefore understand why the defendants should have objected to this instruction. The Court further told the jury that if the agreement was as stated by the defendant Johnson in his testimony the delivery of the written transfer, which was endorsed on the deed and the acknowledgment and privy examination, would not be a compliance with it. Was not this all that the defendants could properly have asked or expected? The Court virtually charged the jury in accordance with the defendant's claim as set forth in their answer and testimony, though the words of the answer were not used. If the defense was good the charge must be unobjectionable.

We will now consider the instructions asked by the defendants:

1. The instruction contained in the first prayer was substantially given and the answer of the jury in response thereto depended altogether upon what was the contract. The Court charged that if the plaintiff had made the contract as alleged by the defendants, there had not been a compliance with it. This was a direct response to the prayer. If the contract was that Billings should make title to the defendant then the plaintiff was not responsible for his failure to do so. When we examine the verdict in connection with the evidence and the charge of the Court, we must conclude that the jury found that the plaintiff had not agreed to execute a deed for the land to the defendant or to see that a good and sufficient title was conveyed to them.

2. The instruction in the second prayer was given.

3. The instruction in the third prayer was substantially given, when the charge is properly construed with reference

to the contention of the defendants and the evidence in the case. Besides, the jury found, as we have said, that the plaintiff did not contract as alleged by the defendants, so that no harm could have come to the defendants if the instruction had not been given.

4. There was no evidence to support some of the allegations of fact in the fourth prayer. What was said with regard to the third prayer is applicable to this one. The Court told the jury that if the plaintiff failed to comply with the contract, which they found to be as alleged by the defendants, the plaintiff could not recover, and they should answer the second issue "Nothing." This was all the defendants could reasonably ask under the circumstances.

As the jury found necessarily that the contract was not made as defendants alleged and, therefore, that no obligation was imposed upon the plaintiff to make a title to the defendant Hardin Johnson or to see that one was made, we cannot perceive how the endorsement on the deed could become material. The fact that the plaintiff had made a deed to Billings and that the defendants had agreed to execute a mortgage to the plaintiff could not disqualify the plaintiff in his character as justice of the peace to take the acknowledgment of the written transfer from Billings to defendants. Suppose it did, how can it affect the question involved in this case, namely, whether the plaintiff had agreed to have title for the land made to the defendants? If that was the contract it was a distinct transaction and had no such direct connection with the Billings transfer as to render the plaintiff incompetent as justice of the peace to take the probate. But in any view of the case we think he was qualified to act in the matter. The question, though, intended to be raised was clearly irrelevant to the controversy.

Upon a full and careful review of the record, it appears to us that the case was properly tried.

No error.

PRICE v. PRICE.

(Filed November 24, 1903.)

1. SPECIFIC PERFORMANCE—*Legacies and Devises—Contracts—Issues.*

In a suit against devisees and executors for specific performance of a contract to devise certain land, it is proper to submit to the jury whether testator devised the land as he contracted.

2. EVIDENCE—*Specific Performance—Records—Wills.*

Where a devisee seeks the specific performance of a contract to devise certain land, executed on the compromise of a certain suit, the record in such suit is not admissible in evidence.

3. EVIDENCE—*Specific Performance—Contracts—Wills.*

In a suit by a devisee for the specific performance of a contract to devise land, evidence as to what land the devisee had in possession, when and where it had been surveyed, and other evidence of like character, is admissible to locate the land received by the said devisee under the will.

4. SPECIFIC PERFORMANCE — *Contracts — Wills — Questions for Court.*

In a suit for the specific performance of a contract to devise certain land, the jury having found that the land devised in the will was the same as that contracted to be devised, it became the duty of the court to construe the contract and the will for the purpose of ascertaining whether the will was a substantial execution of the terms of the contract.

5. SPECIFIC PERFORMANCE— *Contracts—Consideration—Wills—Equity.*

A contract to devise land in consideration of the settlement of a family controversy relative to certain lands is valid and may be enforced in a court of equity.

6. WILLS—*Specific Performance—Contracts—Estates—Legacies and Devises.*

Where a testator contracts to devise certain lands to his children, "with limitations," he may attach such limitations as are in his judgment proper.

PRICE *v.* PRICE.

7. ELECTION OF REMEDIES—*Equitable Election—Specific Performance—Wills—Legacies and Devises.*

A devisee, seeking specific performance of a contract to devise lands, cannot be required to elect whether he will take under the will or under the contract.

MONTGOMERY, J. dissenting.

ACTION by J. Mc. Price against B. F. Price and others, heard by Judge *C. M. Cooke* and a jury, at August Term, 1903, of the Superior Court of UNION County. From a judgment for the defendants both the plaintiff and the defendant J. C. Price appealed.

A. M. Stack, for the plaintiff.

J. A. Lockhart & Son, Burwell & Cansler, Adams, Jerome & Armfield, R. L. Stevens and *R. W. Lemmond,* for the various defendants.

CONNOR, J. It is clear that the contract of December 6, 1899, entered into between J. W. Price and his children, the plaintiff and defendants herein, was well understood between them, and that it was the purpose of the parties to settle the unhappy controversy growing out of the execution of deeds to the father by his former wife and the mother of the plaintiff and defendants for her maiden land. It will be observed that J. W. Price had married on December 4, 1855, and that this deed was executed during the year 1859. The wife and mother survived until 1881. Two of her five children brought suit in 1899 charging that their father had procured the execution of the deed by undue influence and persuasion. The complaint further alleges that since the death of his wife he had married a second time and had other children. They further allege that the father had settled plaintiffs on lands other than those conveyed to him by his wife, but had given them notice to vacate them, and advertised the said land for

sale. The father, in that suit, filed his answer admitting a portion of the allegations, denying others and setting up affirmative defences. It appears that on September 29, 1889, the father had a portion of his land surveyed, plats made thereof and divided into lots, with a view to partitioning it among his children, and that in making such partition he allotted a tract of 183 acres to the plaintiff J. Mc. Price, who was at that time in possession thereof. It will be further observed that on December 6, 1899, just forty-four years had passed since his marriage to the mother of his children. It appears from the pleadings that they had all reached their majority. It is not unreasonable to assume that he was approaching the allotted limit of human life. A second wife and one child of his old age were dependent upon his providence and care. The years of his strength had been devoted to the rearing of the five children of his first marriage, and he had made provision for his oldest sons. One son, it appears, was of feeble mind. The daughter was unmarried, and, the plaintiff says, "too old to ever be a mother." One son, B. F. Price, was unmarried, and it would seem had remained at home with his father. The two sons who were married had been settled upon parcels of land and had received their portion of the personalty. In this condition of his affairs and family we can well understand that he desired to settle the controversy and be at peace with his children. Placing ourselves in the position of the parties, we are better able to understand their conduct and construe the contract which they made looking to this end. Thus, on December 6, 1899, they executed the paper-writing, the terms and provisions of which we are called upon to construe. Following the formal parts thereof, they proceed to say: "That the said parties of the first part, children of J. W. Price, in consideration of an agreement on the part of J. W. Price to devise to the parties of the first part, J. Mc. Price, J. Robert Price, Sarah E.

Price, John C. Price and Benjamin F. Price, respectively, with limitations, the lands belonging to J. W. Price, including that herein conveyed or a part thereof, which have been divided and allotted to the several parties of the first part according to the two plats of the lands made by L. A. Helms, surveyor, and dated September 20, 1889, the part devised to Benjamin F. Price to be charged with the support and maintenance of Margaret M. Price, wife of J. W. Price, if she survives him, which plats are here referred to as a part of this deed, and to which reference is made for the location and description of the lots, of which the respective parties have been put in possession." Then follow appropriate words by which the children "remise, release and forever quitclaim unto J. W. Price all of their right, title and interest in and to the lands conveyed to his by their mother, which is described by metes and bounds. Immediately after the habendum is the following clause: "The further consideration of this deed is an agreement on the part of J. W. Price to devise to J. Robert Price and his heirs the David Phifer place of one hundred acres, of which he is now in possession, but is not described in the plat referred to hereinbefore." This contract was duly proved and recorded January 17, 1900, and on the same day the said J. W. Price executed his will. He gives to his wife and children his household and kitchen furniture, stock on hand and some small legacies. He provides that his stock, etc., shall be used for the benefit of his children "while said family shall remain together," mentioning the fact that his sons J. Mc. Price and J. Robert Price have had their full share of his personal property. He then gives to B. F. Price and Sarah E. "three hundred dollars jointly to assist them in the support and maintenance of my son, J. C. Price, with whose support and maintenance I charge this sum and the lands devised to them in the sixth item of this will." In the

fourth item he devises, "in lieu of the dower and thirds" to which his wife was entitled, to her and to B. F. Price several tracts of land, including his dwelling house and outhouses, aggregating 351 acres. The several tracts, he says, "are more particularly shown on a plat made by L. A. Helms on September 20, 1889, to which plat reference is hereby made." This land he gives after the death of his wife to B. F. Price in fee. He further provides and directs that his son J. C. Price and his daughters Sarah E. Price and Mary E. Price (the child by his second wife) shall have a home with his son and his wife until they shall severally marry. This provision is to continue in the event of the death of B. F. Price, that is, they shall continue "to have a support from and home upon the land." In item 5 he gives to his daughter Sarah E. Price three tracts of land aggregating 162½ acres, two of which tracts are shown on the L. A. Helms plat. One tract of 11½ acres, he says, was purchased in 1897 after the plat was made. In item 6 he gives to his son B. F. Price and his daughter Sarah E. Price, "charged with the support and maintenance of my son J. C. Price and subject to the provisions of item 4," three tracts aggregating 130¼ acres, two of which tracts are shown on the L. A. Helms plat. The other tract of 10¾ acres was purchased in 1897. In item 7 he gives to his son J. Mc. Price 183 acres, shown on the L. A. Helms plat. To this devise are certain limitations, which will be referred to later on. In item 8 he devises to J. Robert Price the David Phifer land, containing 100 acres. To this devise are certain limitations. All other real estate owned by him is directed to be sold by his executors, and after paying debts and pecuniary legacies the balance is to be divided equally between his children. In item 11 he says that in order to make more definite and certain the identity and location of the lands hereinbefore devised and the respective persons to whom they are devised "I have written the names

of each and every of the parties within the boundaries of the plats made by L. A. Helms and M. D. L. Biggers, etc." The last named plat being of the two small tracts purchased in 1897. By a codicil executed September 24, 1901, it appears that with the consent of his son J. Robert Price he exchanged the Phifer land for a tract of 172 acres, which he devises to his said son. The date of his death does not appear in the record.

This action is brought November 14, 1902, by the plaintiff against his brothers and sisters and the executors of J. W. Price. The plaintiff alleges that the said J. W. Price "failed and refused to perform his said contract in that he did not devise to him any part of the two tracts of land conveyed to said J. W. Price by his wife and described in the contract of December 6, 1899," and further, that whereas he contracted to devise said land to his children "respectively, with limitations," he placed no limitations on the land devised to B. F. and Sarah E. Price, while he did place limitations on the lands devised to the plaintiff and J. Robert Price. He says that "the said J. W. Price contracted to devise to J. Mc. Price (plaintiff) and his brothers and sisters the same quantity and quality of estate in said lands, yet B. F. Price and Sarah E. Price, instead of getting two-fifths with the same limitations that were placed on the plaintiff, get in fee-simple more than three-fourths of the land contracted to be devised to the five children of M. L. Price, and get all of the two tracts that were in litigation and described in Exhibit C; that he failed to devise any land to J. C. Price, who is weak-minded and incapable of looking after his rights, and who is an unmarried man without children and not likely to ever marry and have children; that Sarah E. Price is unmarried and too old now to ever become a mother, and if the same limitations had been placed on her devise that was on plaintiffs', as said J. W. Price contracted to do, then this plaintiff or his children

would certainly have gotten a part of her share at her death." He makes the same complaint in regard to land devised to B. F. Price. He further complains that his father had sold off part of his land and had also sold some cross-ties. For these alleged breaches of the contract on the part of his father he demands judgment that the defendants be ordered to specifically perform said contract and to convey to him, the plaintiff, in fee-simple, one-fifth interest in the land of J. W. Price as shown in the said two plats, including the two tracts of land particularly described in the deed of compromise, and for three hundred dollars damages; also that a decree be made declaring the plaintiff and his brothers and sisters owners and tenants in common of said land shown in said plats, etc.

The defendants admit the execution of the contract and the facts leading up thereto, but they deny the construction put upon it by the plaintiff, and allege that their father in all respects performed his part of said contract in the will hereinbefore set out. Upon the cause coming on for hearing, it appeared that J. C. Price was mentally incapable of attending to his own affairs, and a guardian *ad litem* was duly appointed for him. The Court, after objection by the plaintiff, submitted the following issue to the jury: "Did J. W. Price devise to J. Mc. Price the land he contracted to do by the instrument of December 6, 1899?" To which the jury responded in the affirmative. The issue was properly submitted to the jury for the purpose of fixing the single fact in controversy, to which it is directed. The plaintiff submitted two issues: 1. What lands or interest in lands did J. W. Price contract to devise to the plaintiff J. Mc. Price? 2. What lands did J. W. Price devise to the plaintiff? To the refusal of his Honor to submit these issues the plaintiff excepts. His Honor's ruling was entirely correct. The plaintiff offered to introduce the record in the original suit of J. Mc. Price and Robert Price against J. W. Price, to which the defendants

objected, and upon the objection being sustained the plaintiff excepted. His Honor's ruling in this respect was correct. The plaintiff then introduced the original contract and the will of J. W. Price, and also the original plats made by L. A. Helms on September 20, 1889. The plaintiff testified that he knew the plats and the handwriting of his father, and the names of the children written upon the plats designating the several tracts of land are in the handwriting of J. W. Price; that those names were not there the day the contract was made; he says he knows the land which his father owned at that time; that he also owned some other lands which are not described in these plats; that the expression "the lands herein conveyed" refers to the lands that were then in litigation; that in 1899 the lands had not been allotted to the children; that he did not devise any part of the land in litigation to him. He says that he was living on the 183 acres; that he moved on it about seven years ago, but had been working it longer; that the tract originally contained 226 acres, and that the surveyor cut off 47 acres of the land, which was not allotted to him; that there are some 55 acres of the land which is not willed to any of the parties. He says that he was with the surveyor and his father when the lines were run; that he has been in possession of the 183 acres since 1889; that he saw the plat at the time of the compromise; that it was on exhibition; that he had said to Mr. Haywood that he was to get the 183 acres by the compromise; that he was to get over that. The plaintiff rested.

The defendants introduced Helms, the surveyor. He said that he surveyed the land and made a plat in 1889; that the plaintiff was along with them when they ran the lines; that when the 183 acres were run off for the plaintiff he was present; that J. W. Price would show him where he wanted a division for a certain one of his children, naming the one. To all of this testimony the plaintiff objected, and, upon his

objection being overruled, excepted. His Honor said that he admitted the testimony for the purpose of locating the lines. We are of opinion that it was competent for that purpose. The witness then testified in regard to the surveying of the other lots. Haywood was then introduced and testified to substantially the same. In answer to a question by the Court to locate the land, he said: "There are 183 acres. It is right near me. He has been living there, I think, about nine or ten years. He has been controlling it, I think, ever since I moved there in 1888. I know he has had control of it ever since I went there. I remember when Helms surveyed the land. I saw them running it. I don't remember whether I saw Mack with them or not. I was just working in the field when they came along. I was not living on the land that they ran for him. I remember the time that Mack and his father had a compromise of their suit." The plaintiff objected to this testimony, and, upon its being overruled, excepted. The witness further said that "he told me when I first went there that his father told him to come down there and settle it up; that he would fix it up so that he could get it some day; he told me just after the compromise about having it settled, or something that way." This testimony was objected to, objection overruled, plaintiff excepted. There was other testimony of the same character, all of which was directed to the location of the land. The Court stated that the foregoing evidence was allowed only for the purpose of locating this land which the plaintiff got in the will or contract. To which the plaintiff excepted.

The Court instructed the jury that if the testator J. W. Price had allotted and put J. Mc. Price in possession of a certain tract of land, that was the lot of land he contracted to devise to J. Mc. Price; and, if they find from the evidence that the lands devised to the said J. Mc. Price is the same lot or lots that was allotted to J. Mc. Price, and of which he

was put in possession by J. W. Price, they will answer the first issue "Yes." To which plaintiff excepted. The instruction is correct. The plaintiff requested the Court to instruct the jury that if they believed the evidence the plaintiff did not get under the will the lands that J. W. Price contracted to devise to the plaintiff J. Mc. Price. Upon his Honor's refusal to so instruct the jury the plaintiff excepted. The plaintiff requested the Court to further instruct the jury that under the contract the plaintiff was to get an undivided one-fifth interest in all the lands described on the plat of Helms, referred to in the deed of compromise; that the plaintiff was, under the contract, to be devised a one-fifth interest in value of the lands described in the deed of compromise. To the refusal to give these instructions the plaintiff excepted. The plaintiff then requested the Court to construe the deed of compromise and not leave any part thereof to the jury.

This issue being answered, it became the duty of the Court to construe the contract and the will for the purpose of ascertaining whether the will was a substantial execution of the terms of the contract, and his Honor so held. In our opinion his Honor's ruling was entirely correct. There can be no question that a contract upon a sufficient consideration to devise lands is valid and may be enforced in a court of equity, the decree being so drawn as to declare the parties to whom the land is devised, or, in the event of a failure to devise, the heirs at law to hold such lands in trust for the persons to whom the testator had contracted to devise them.

"The validity of a contract by which one of the contracting parties agrees with the other, either for a good or valuable consideration, that he will make a will devising his property, whether real or personal, is valid beyond a doubt." Underhill on the Law of Wills, sec. 285. "The party who has made the promise to give property by his will may have made some testamentary provision for the other party to the con-

tract which the latter claims is not a sufficient compliance with the terms of their agreement. This is usually the case where the terms of the contract describing the land or other property to be given are vague, indefinite and open to doubtful interpretation. Generally a substantial rather than a literal compliance with the terms of the contract is all that can be required." *Ibid.*, sec. 290.

The principles by which courts of equity are governed in sustaining and enforcing such contracts as the one set out in this record are well settled and strongly stated by *Lord Hardwicke* in the case of *Stapilton v. Stapilton,* 1 Atk., 2 (2 White & Tudor's L. C., 1675, star p. 824). In speaking of a contract made for the purpose of settling a family controversy he says: "It was to save the honor of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done * * * and, considering the consequence of setting aside this agreement, a court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family." In the notes to that case it is said: " 'From the case of *Stapilton v. Stapilton,*' observes *Lord Chancellor Sugden,* 'down to the present day, the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or to save the honor of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers.' *Westby v. Westby,* 2 D. & War., 503." "The compromises of doubtful claims, whatever may be the actual rights of the parties, have, from the policy of preventing litigation, been generally upheld in all enlightened systems of jurisprudence. * * * And

where a deed of family arrangement has been acted upon for many years, and no fraud is imputed, the Court will not set aside or alter such deed upon the mere allegation by some of the parties to it that the provisions did not carry out their intentions. *Bentley v. Mackay,* 31 Beav., 143; 10 W. R. (L. J.), 873.

"Fair compromises, especially between members of a family, are favorably looked upon by courts of equity, their object being to prevent or put an end to litigation and to preserve the peace and property of families." Beach Mod. Eq., 1083.

Gaston, J., says: "The agreement was confessedly entered into for the purpose of quieting disputes between the children of the same father, in relation to the disposition of his property; it is apparently equal; it is not denied to be fair; and was deliberately assented to as a proper and just family arrangement. Such arrangements are upheld by considerations affecting the interests of all the parties, often far more weighty than any considerations simply pecuniary." *Bailey v. Wilson,* 21 N. C., 182 (189).

Guided by these precedents of great and wise Chancellors, we have no difficulty in sustaining the contract and will made in pursuance thereof.

The plaintiff is the only one of the parties to the contract who complains of the disposition made by his father of his property. He points out a number of respects in which he says his father "failed and refused" to comply with his promise. Many of the complaints refer to matters in which he is not interested, and, if true, he has no right to complain. The two objections which affect him and which were relied upon in the argument are, first, that he failed to devise to the plaintiff any interest in or any part of the two tracts of land which were in litigation in the suit; that he gave B. F. Price and Sarah E. Price three-fourths of his land and gave

none to J. C. Price. The last suggestion is not sustained by an examination of the will. B. F. Price and his mother received for their joint lives, with remainder to B. F. Price, 350¼ acres, charged with the support and maintenance of J. C. Price and Sarah E. Price. It is evident that this land is to be a home for the family, and the charge extends beyond the life of B. F. Price. Sarah E. Price received 102 acres, and 130 acres are given to them jointly charged with the support and maintenance of J. C. Price. The entire number of acres devised is 925. Treating the devise of 130 acres as in trust for J. C. Price, these three received 555 acres, which is eighty-seven acres in excess of three-fifths of the whole, charged, however, with the life-estate of the mother in a portion of it, and the support of the family in the whole. Whereas the plaintiff received 183 acres, of which he has been in possession for more than ten years, and which is but two acres less than one-fifth of the whole number devised. It is clear, upon the testimony, including the contract, the plats and the will, that it was understood by all the parties that the plaintiff was to have the 183-acre lot. The total number of acres devised being 925, the number of acres in the two lots "herein conveyed" is 463, which leaves of the other lands 462 acres. The plaintiff says: "I was to get the 183 acres by the compromise. I was to get over that." Deducting the 183 acres from 462 leaves 279 acres to be divided among the other four children. Give the plaintiff ninety-two acres, being one-fifth of the 463 acres, in addition to the 183 acres which he says he was to receive, and he would have 275 acres. One-fourth of the 279 acres left to be divided between the four children would give them each sixty-nine acres, to which add ninety-two acres, one-fifth of the 463, and each of them would receive 162 acres, thus giving the plaintiff 113 acres in excess of each of the others. This, too, in the light of the fact that he has used and occupied the 183 acres for more than ten

years and without any regard to the provision for the wife of J. W. Price in lieu of her dower. This result would seem to exclude the contention of the plaintiff as to the intention of the parties in making the contract. But it is manifest that at the time the compromise was made the plats were "on exhibition," and that the parties understood what tracts were to be devised to each of them. While the names of the several children were not on that day written on the plats, the testator in his will made on the day it was recorded, says that in accordance with the terms of the contract "he had written the names of each and every of the parties within the boundaries on the plats," and they so appear in evidence. The plaintiff is not interested in the disposition of the land as among the other children, it being shown that he has received all to which he is entitled. There is no suggestion that the land devised to him is not of equal value with the other shares. If it were necessary to do so, the reasons which controlled the testator in the disposition of the other lands could easily be pointed out. In truth, they are apparent upon the face of the will. Much was said on the argument in regard to the meaning of the words "or a part thereof," as to whether they referred to the land "herein conveyed," or the other lands of the testator. I am unable to see that it is material what view is taken of this question. He devises all of the lands "herein conveyed" save a few acres, and that he directs to be sold and the net proceeds to be divided among his children. The plaintiff, however, says that the words "with limitations" are to be understood as an agreement to place the same limitations upon the lands given to each of the children. If not so, that they are so indefinite that the Court cannot specifically enforce a compliance with them, thus rendering the entire contract void for uncertainty. The words are to be construed as leaving in the testator the liberty of attaching such limitations as in his judgment he thought proper.

It is evident that there were reasons why the same limitations should not be attached to the land devised to each of the children. Their condition in life was different; some were married and others were single. The plaintiff says the daughter was "too old to become a mother." Again, it is evident that some provision must be made for the support of J. C. Price. By a proper construction of the contract the testator reserved the right to attach such limitations as he saw fit. If it could be seen that he had exercised this right arbitrarily or unjustly, or that he had abused the right thus reserved, it is possible that a court of equity would, so far as possible, repair the wrong thus done the testator's children. However this may be, it is evident that the plaintiff alone complains of the limitations attached to the devises, and he places his objection upon very untenable ground, that if the limitations had been otherwise, possibly his maiden sister and his bachelor brothers would have died without children, and either he or his children would derive some benefit therefrom. It can hardly be supposed that any of the parties had such remote contingencies in mind. There was evidently no speculation being done upon the death of maiden sisters and bachelor brothers for the benefit of nephews and nieces. We can easily see why no limitation was placed upon the land given to B. F. Price. This land was to be a home and a source of support to the feeble-minded brother and maiden sister so long as they lived. In respect to the land given for the support and maintenance of J. C. Price, a reasonable construction of the language would impress a trust upon the legal estate, and it is more than probable that, upon the death of J. C. Price, the devisees of the legal title would hold in trust for his heirs at law, of whom the plaintiff would be one. J. R. Price, to whose land limitations are attached, makes no complaint. His Honor, however, without objection on the part of the defendants, construed the contract to mean that the limitations should not extend beyond

the wife and children of J. Mc. Price, and adjudged that the lands devised to J. Mc. Price should be held by him during the term of his natural life, then by his wife and children during the life or widowhood of his wife, and, at her death or coverture, by his children in fee, and we do not understand that either of the parties except to this portion of the judgment. The contract made by the parties, having in view a family settlement of property and compromise of all matters in controversy, should receive a liberal construction and be sustained unless violence is done to some well established principle of law. After a careful consideration of the entire record, I think the testator has substantially complied with the terms of the contract and that his Honor's judgment in that respect was correct and should be affirmed.

If this will should be set aside and the contract rescinded, the result would be that the compromise of the original suit would also be rescinded, leaving the plaintiffs J. Mc. Price and J. R. Price litigants with their brothers and sisters, reviving the animosities and bitterness which it was the last will and desire of their father to bury. The result of again launching them upon this troublous and uncertain sea of litigation over the acts of their father and mother would be deplorable. We do not think that there is any principle of law controlling the construction of contracts which makes it our duty to set aside the will of the testator, convinced as we are that he, in good faith, dealt by his children in accordance with the spirit if not the letter of his contract. The judgment of this Court should leave them as he did in respect to their property rights.

Judgment affirmed.

APPEAL OF DEFENDANT JOHN C. PRICE.

CONNOR, J. In this case, on the suggestion of the plaintiff that J. C. Price did not have sufficient mental capacity to attend

to his own business, a guardian *ad litem* was appointed for him by the Court, and an answer filed for him by the guardian. Afterwards, the other defendants suggested that J. C. Price had sufficient mental capacity to attend to his own business, and by consent of all the parties to the action it was ordered by the Court that the question of his mental capacity to transact his own business be inquired into, as is provided in section 1670 of The Code. In the same order, it was directed that the answer had been filed by the guardian *ad litem* should be temporarily withdrawn. The jury, for the trial of the issue as to mental capacity of J. C. Price, returned for their verdict that he was not competent to attend to his own business. Afterwards the Court ordered a reference to ascertain which would be the more advantageous for said J. C. Price to take under the will or under the contract; and it was adjudged further, that the said contract and will presented a proper case for the exercise of the doctrine of election.

We think there was error in the making of the order of reference. Election, in equity, is a choice which a party is compelled to make between accepting a benefit under an instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by virtue of the same instrument.

The doctrine of election does not arise out of contract, and the rights which J. C. Price had in the premises grow out of the deed of settlement and J. W. Price's contract to devise the land as therein set forth. If the deed from the defendant's mother to his father J. W. Price had been set aside on the ground of fraud in the suit which was settled by compromise, and J. W. Price had then attempted by his will to devise J. C. Price's interest in the land which descended to him through his mother to another person, and also a portion of his own land to J. C. Price, then the doctrine of election might be invoked against J. C. Price. But there was no adjudication

in the action between the parties concerning the alleged fraud of J. W. Price in the suit which has been compromised. All the children, as we have seen, in the plaintiff's appeal, remised, released and quitclaimed their interest in the land of their mother to their father J. W. Price, and J. C. Price's rights growing out of that compromise and settlement, are contained in the deed of settlement, and therefore rests upon contract.

Error.

PLAINTIFF'S APPEAL.

MONTGOMERY, J., dissenting. It appears from the pleadings in this case that the plaintiff J. Mc. Price and the defendants B. F. Price, John C. Price, J. Robert Price and Sarah E. Price, are children of the defendant J. W. Price and M. L. Price, his wife (both now deceased), who were married early in 1859; that within a few months after the marriage J. W. Price, the husband, received a deed for two tracts of land belonging to his wife, through the intervention of a trustee, for the alleged consideration of $3,000; that upon the death of M. L. Price in 1881, the plaintiff in this action and his brother J. Robert Price instituted an action in 1889 in the Superior Court of Union County against their father J. W. Price and their brothers J. C. Price and B. F. Price and their sister S. E. Price (the brothers and sisters being made defendants doubtless because they would not join in the action as plaintiffs) for the purpose of having the deed from their mother to their father declared void for fraud and undue influence, alleged to have been practiced and exerted by the father on the mother; that that action was compromised and dismissed, each party to pay his own costs, in December, 1899, the compromise being on the following terms: The children above-mentioned of J. W. Price remised, released and forever quitclaimed all the right, title and interest

which they had as heirs at law of their mother, M. L. Price, in and to the two tracts of land which were in litigation, to J. W. Price, and J. W. Price in consideration of the compromise and of the conveyance made to him by his children agreed to devise to them respectively, with limitations, the land belonging to J. W. Price, including that herein conveyed as a part thereof, which had been divided and allotted to the several parties of the first part, according to the two plats of the land made by L. A. Helms, surveyor, and dated the 20th September, 1889, the part devised to B. F. Price to be charged with the support and maintenance of M. L. Price, wife of J. W. Price, if she survives him, which plats are here referred to as a part of this deed, and to which reference is made for the location and the description of the lots, of which the respective parties have been put into possession.

J. W. Price made his last will and testament in which he devised to the paintiff "for his life and after his death to his wife and children for the terms of the life or widowhood of his wife with the remainder in fee-simple to his children, if he die having issue surviving him, a certain tract of land of 183 acres," included in the Helms plat but not in the two tracts which were formerly the property of his deceased wife, M. L. Price. There was a further limitation that if J. Mc. Price died without leaving issue surviving him the tract of land devised to him should revert to all his "other heirs equally in fee-simple, my grandchildren taking *per stirpes* if their parents be dead." The testator further devised to his son J. Robert Price, with exactly similar limitations, another tract of land; he made provision for the support of his son J. C. Price out of the profits of certain of his lands, and he devised to his other son and daughter in fee-simple certain other of his tracts of land.

The plaintiff's contention is that in two respects at least the devise was not a full and true execution of the deed of

settlement and compromise, the compromise having been reduced to writing executed by the parties, probated and registered, and that, therefore, the land mentioned in the deed of settlement belongs to himself, J. Robert Price, J. C. Price, B. F. Price and Sarah E. Price as tenants in common, in equal shares. First, that according to the terms of the compromise the whole of the land (two tracts) formerly belonging to his mother was to have been devised to himself and his brothers and sisters above-mentioned, and that the whole of it was not so devised; and, second, that his father devised to him only a life-estate with limitations over to his brothers and sisters, or their issue in case he died without issue, in a tract of 183 acres not embraced in the land formerly belonging to his mother, and placed no limitations in the devise to his other children, except that of J. Robert Price, who was a party plaintiff with him in the suit that was compromised.

As to the first branch of the plaintiff's contention he cannot be heard to complain. Under the terms of the compromise, the father was to devise to the parties named "respectively, with limitations, the land belonging to J. W. Price, including that herein conveyed as a part thereof, which has been divided and allotted to the several parties of the first part, according to the two plats of land made by L. A. Helms, surveyor, and dated the 20th September, 1899, * * * which plats are here referred to as a part of this deed, and to which reference is made for the location and description of the lots of which the respective parties have been put in possession." And in item 7 of the will the testator said: "I will and devise to my son J. Mc. Price for his life, and after his death to his wife and children, for the term of the life or widowhood of his wife, with the remainder in fee to his children, if he die having issue surviving him, a tract of land in Union County, N. C., containing 183 acres more or less,

adjoining the Givens land, the Thompson land (now Rodman's), the King land and the 100-acre tract devised to B. F. Price and Sarah E. Price, lying on the south side of Twelve Mile Creek, being more particularly described on a plat made by L. A. Helms, surveyor, on the 20th September, 1889, to which reference is hereby made for a more particular description of said land; and if my son J. Mc. Price die without leaving issue surviving him, then it is my will that said land revert to all my other heirs, equally, in fee-simple, my grandchildren taking *per stirpes* if their parents be dead."

His Honor properly allowed parol testimony to show that the plaintiff had had possession of the 183-acre tract since it was surveyed by Helms, and that he admitted it was the tract he was to receive, and had received, under the compromise.

But the other branch of his contention, in my opinion, ought to be sustained. He requested the Court "to construe the deed of compromise and not leave any part thereof to the jury." We think the Court should have pursued that course. The agreement to devise to the parties, including the plaintiff, "respectively, *with limitations,*" the land belonging to J. W. Price, etc., is too indefinite to convey any meaning. The word "limitations" as it is used in this deed is capable of being applied in so many different ways that we cannot arbitrarily give it a particular definition, or direct it to any particular beneficiary. And if it could be done in any other case we could not in the present one, because, whatever limitations of the estate of either one of the parties might be made, the same would have to be attached to them all; and that has not been done. That an agreement may be valid it is necessary that the parties use language sufficiently clear for it to be understood with reasonable certainty what they mean; and if an agreement is so vague that it is not possible to gather from it the intention of the parties, it is void, for neither

the Court nor the jury can make an agreement for the parties. In *Silverthron v. Fowle,* 49 N. C., 362, the Court said: "And if a contract is so worded that no definite meaning can be attached to it, it is the duty of the Court so to instruct the jury. The Court is no more at liberty to give what was the meaning of the parties than is the jury."

SEAWELL v. CAROLINA CENTRAL RAILROAD COMPANY.

(Filed November 24, 1903.)

EVIDENCE—*Res Gestae—Carriers—Passengers—Assault.*

In an action against a carrier for failure to protect a passenger against an assault at a station, the evidence by a witness that he told the person assaulted immediately after the assault that an employee of the carrier took part in the assault is competent as part of the *res gestae.*

CONNOR and WALKER, JJ., concurring.

A PETITION TO REHEAR this case, reported in 132 N. C., 856.

J. D. Shaw, W. H. Day and *Shepherd & Shepherd,* for the petitioner.

J. D. McIver, W. J. Adams, R. L. Burns, Douglass & Simms, G. W. McNeill, G. H. Humber and *U. L. Spence,* in opposition.

CLARK, C. J. This is a petition to rehear our opinion in this case, 132 N. C., 856. The chief exception relied on is the refusal of the Judge to non-suit the plaintiff, on the ground that there was no evidence. The plaintiff, who was a candidate for Lieutenant-Governor of this State, had gone

in his canvass of the State to speak at a town where the party whose candidate he was was unpopular. He went back to the railroad station to take the train, and while at the station, with a mileage ticket in his pocket, awaiting the arrival of the train, a mob came up and threw eggs at him, striking him with them in the face, on the head and other parts of his person, and at the same time using insulting, indecent and opprobious remarks. The defendant had three employees present, Ramsour, Carroll and Wells, and it is not contended that either of them gave the plaintiff the slightest protection or assistance, and it is further clear that even when the train arrived the conductor gave him no protection, but evaded doing so by going back on the train and through the cars to reach the front end of the train to communicate with the local agent. There was evidence tending to show that not only no protection was afforded or attempted by any of the defendant's employees, but that Carroll and Ramsour encouraged the assault, Carroll engaging with the mob (which had come out of the railroad office with Ramsour) in throwing eggs and joining in the cries of the mob, and Ramsour saying they "had not egged him half enough" after the first eggs were thrown.

The Constitution and laws of this State guarantee freedom of speech, and nothing could be more unmanly than a mob assailing one man in such manner for his difference from them in his political opinion. No right-thinking man, here or elsewhere, will express other opinion of the proceeding, and the most that can be said is that it was the act of a mob, for which the community was not responsible. The plaintiff was an invited guest of the defendant and on its premises, a passenger, who, at the invitation of the defendant, had bought a mileage ticket over its road and had gone to the station to take its train. The defendant was a *quasi* public corporation, forbidden to make any discrimination in the discharge of its

duties to the public other than as provided by the power from whom it holds its franchise, to exist and operate its road. It owed to the plaintiff the same protection and courteous treatment it owed to every other passenger. It could not extend this protection otherwise than through its agents and employees. Of the four employees present—Ramsour, Carroll, Wells and the conductor—not one is shown to have made the slightest attempt to protect the plaintiff, and there is evidence that two of them actively participated in, or, at least, encouraged the assault.

A careful examination of all the authorities shows no case, and the appellants cite none, in which, under similar circumstances, the railroad company has not been held liable, unless it exerted what power it could to protect the passenger from the mob. Here, if the agent had taken the passenger into his private office, or offered to do so, had expostulated with the mob, and on the arrival of the train, in company with the conductor and his own employees escorted him to the train, the eggs would hardly have been thrown, and at any rate the defendant would not have incurred liability for this breach of duty. Or there might have been other attempts to protect the passenger while on its premises, and which the jury might have held sufficient. But here there was none whatever. It was the assaulting mob, not the passenger, whom the agent admitted to his office, and he issued therefrom with the mob at his heels, who immediately began spattering the plaintiff with eggs and abuse. Such attempted intimidation for political opinion's sake cannot be safely permitted, especially by great public corporations holding their franchises in trust, impartially, for all the public.

The cases are uniform, fastening liability upon a common carrier for failure to extend such protection, as it can, to a passenger against a mob. No one before has questioned that the corporation would be liable when its own agents actively

encouraged or participated in the assault by the mob. The law has never been more clearly and accurately stated than by *Mr. Justice Ruffin* in *Britton v. Railroad,* 88 N. C., at p. 544; 43 Am. Rep., 749, where the plaintiff was a colored passenger. Said *Judge Ruffin:* "The carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented; and while not *required to furnish* a police sufficient to overcome *all force,* when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from *every quarter* which might reasonably be expected to occur under the circumstances of the case and the condition of the parties." For this he cited several authorities. Many others to like purport, but later, were cited by us in our former opinion, 132 N. C., at p. 859. Among the numerous additional cases are *Railroad v. Jefferson,* 89 Ga., 554; 17 L. R. A., 571; 32 Am. St. Rep., 87; *Railroad v. Burke,* 53 Miss., 200; 24 Am. Rep., 689; *Spohn v. Railroad,* 87 Mo., 74; *Railroad v. Pillsbury,* 123 Ill., 9; 5 Am. St. Rep., 545; *Railroad v. Hinds,* 53 Pa. St., 512; 91 Am. Dec., 224; *Krantz v. Railroad,* 12 Utah, 104; 30 L. R. A., 297; 1 Thompson Neg., sec. 968, and many other cases where the liability was for omission to make reasonable efforts to protect the passenger from assaults by other passengers or by a mob. There is not, and could not be, any authority holding a common carrier irresponsible when its agents participated in or encouraged the assault. The station and cars of a railroad are *quasi* public, where every one who pays his fare has a right to be, and if such corporations, permeating everywhere as they do, can, with impunity, through its employees, assault or permit assaults on its passengers for the political opinions enter-

tained by them (as in this case), or for any other reason, the result would be deplorable in the extreme.

Only one other point requires notice, and that only because it was pressed with great zeal on the argument. A witness (McBryde) having testified to evidence tending to show that he saw Carroll, one of the defendant's employees, throw an egg at the plaintiff, further stated, under objection, that he hollered and told the plaintiff, in the presence of the crowd, "just right afterwards." On cross-examination McBryde said it was "a minute afterwards." This was not excepted to, nor was his statement thereupon, that he told Seawell that he saw the man throw the egg, excepted to. If it had been, the first statement of the time may, nevertheless, have been more correct. In such circumstances the passage of time cannot be very accurately measured. But had the evidence been duly excepted to, it was properly received, not only as corroborative evidence, but as substantive testimony, as a part of the *res gestæ*. *Harrill v. Railroad,* 132 N. C., at p. 659; *Bumgardner v. Railroad, Ibid.,* 438. The egg-throwing was not over, for McBryde said he told the plaintiff after Carroll threw the first egg, that the plaintiff shook his cane at Carroll, and thereafter he saw Carroll throw another egg; but if the egg-throwing had been over the abuse and insults were not, for even as the train rolled off, carrying the plaintiff, the crowd was jeering the plaintiff, the station agent and Wells and Carroll were all laughing at his pitiful plight, and one of the crowd yelled after him, "Put that suck-egg dog off at Buffalo and let him wash himself." The statement of McBryde to the plaintiff was made before the train had started to move, and he says Carroll threw another egg at the plaintiff, just as it started. The exclamations of third parties present are as much a part of the *res gestæ* as those of the parties themselves. *State v. McCourry,* 128 N. C., 598; *Harrill v. Railroad, supra.*

Even if the exception had been duly taken and the evidence

had been erroneously admitted, yet if it had been rejected there was sufficient evidence to refuse the non-suit, which is the point now before us, in view of the fact that the defendant's station agent admitted in his testimony that no steps whatever were taken to give the plaintiff any protection, and the evidence tending to show that the railroad employees aided, abetted and encouraged, and even shared in the assault. Besides, from the other facts in evidence, and not denied, such error (if it had been error) would have been too minute and immaterial to justify a new trial.

No court of justice can tolerate such conduct as that of the agents of the defendant towards the mob in its assault upon the plaintiff, while entitled to the protection of a passenger at its hands.

Petition dismissed.

CONNOR, J., *concurring*. I have carefully examined the record in this case, especially those portions referred to in the petition to rehear. I do not understand that any denial is made of the principle upon which the defendant's liability for a breach of duty to protect the plaintiff from injury or assault is made, or that it is denied that if the defendant's agents participated therein or failed to protect the plaintiff from such assault, if they could have reasonably apprehended or prevented the same, is brought into question by the petition to rehear. The authorities cited in the opinion filed at last term amply sustain the conclusion reached by the Court, and I do not deem it necessary to review them or further discuss that phase of the case.

The first assignment of error in the petition is a suggestion that "on pages 72 and 73 of the record the re-direct examination of Thomas McBryde discloses two exceptions, being numbers 4 and 5." It was urged that his declaration could not be considered as a part of the *res gestæ*. "It was a narrative

of a past occurrence and could only have been received for the purpose of corroboration; that the judge did not restrict it to that purpose, but left it to the jury without explanation." The petitioner says these exceptions were overlooked by the Court. The record, in respect to this testimony, shows that the witness was being examined in regard to seeing a man raise his arm and motion in the direction of the plaintiff. The Court asked him if he said anything to plaintiff at the time he saw the motion made, to which witness responded: "Not at that time, but afterwards." Counsel then asked: "How long afterwards?" Witness answered: "Just right afterwards." Objected to by defendant; overruled. Defendant excepted. Q. "What did you tell Seawell when that motion was made?" Defendant's counsel interposed the question: "How long afterwards—how many minutes?" Ans. "It was a minute." Plaintiff's counsel then asked: "What did you say?" Witness answered: "I told Mr. Seawell that that man with the red head threw an egg at him, for I saw him do it." Counsel asked: "Had Seawell made an assault on him?" Ans. "No, sir." Defendant objected to this evidence; overruled. Exception. It appears that this witness had sworn on his direct examination that he was the news-boy on the train; that he saw but one egg thrown; that it was by Paul Carroll, "a red-headed fellow." That witness was standing on the platform. It seems that in consequence of what witness said, plaintiff went to Carroll, drew his cane and asked him if he threw the egg. Carroll denied it. After the first egg was thrown, two others were thrown. About two and three-fourths minutes elapsed between the throwing of the first and the last egg. It is very difficult, unless the entire testimony is set out, to describe the transaction as it occurred. It will be well to keep in mind that all the eggs were thrown while the cars were standing at the depot, about three minutes. It is very doubtful whether, under the rules prescribed by

the Court for noting exceptions, the record presents any exception to the portion of the testimony to which the assignment of error is pointed. However this may be, I think the declaration of McBryde was competent as a part of the *res gestæ*. He testified that it was made a minute after Carroll threw the first egg and before the transaction was concluded. It is difficult to fix the precise time within which a declaration must be made to entitle it to be admitted as a part of the *res gestæ*. We do not find that the courts or text-writers have undertaken to do so. The principle under which such testimony is admitted as an exception to the general rule rejecting hearsay evidence is discussed and the authorities reviewed by *Mr. Justice Montgomery* in *Bumgardner v. Railroad*, 132 N. C., 438. See also *Harrill v. Railroad*, 132 N. C., 655. In *State v. McCourry*, 128 N. C., 594, the Court, speaking through *Mr. Justice Clark*, quotes with approval the following language from 1 McLain Cr. Law, sec. 411: "Evidence of the entire transaction is admissible, and of the surroundings." "Declarations and exclamations made by by-standers have been held admissible as a part of the transaction." *Ibid.*, sec. 411. *Mr. Underhill*, in his work on Criminal Evidence, secs. 96 and 97, says: "On the whole, the *res gestæ* cannot be arbitrarily confined within any limits of time. The element of time is not always material. If the declarations are narrative and descriptive in their form and character, if they are not the impromptu outpourings of the mind, they should be rejected, though uttered only a few minutes after the main transaction. The spontaneous, unpremeditated character of the declarations, and the fact that they seem to be the natural and necessary concomitants of some relevant transaction in which their author was a participant, constitutes the basis of their admission as evidence. If a sufficient period has intervened between the act and the statement for consideration, preparation or taking advice, the statement

may be rejected. The mere likelihood or probability that the statement was the result of advice or consideration may exclude it. Actual preparation need not be shown. Declarations made immediately after the principal transaction have been received in homicide cases. And the American cases, as a rule, do not sustain the strict English doctrine that the declarations, to be admissible, must be strictly contemporaneous with the main transaction, if the declarations are illustrative verbal acts and not mere narratives of what has passed."

It would be difficult to reconcile the numerous cases in which the competency of declarations, offered as a part of the *res gestæ*, are admitted or rejected. We can only seek to adhere to the general principles and apply it to the cases as they arise. I think the declaration in this case is within the principle.

The next assignment of error is that the plaintiff was permitted to show by Ramseur that he was laughing at the egg-throwing after it was over; that the admission of this as substantive testimony was erroneous, and that his Honor expressly said that he admitted it as affecting the credibility of the witness. As the train came up Ramseur went to the express car; he heard a noise and looked around and saw that the egg had struck the plaintiff; that he was reaching down pulling something out of his collar. The witness went back of the platform, and did not go where the plaintiff was. To the question, "You were laughing at the time?" he answered: "I suppose I was laughing, like everybody else was." He said that he was laughing as he started back when he saw the plaintiff getting the egg out of his collar. To the question, "What were you laughing at?" he answered: "I reckon I must have been laughing at that." He further said that he saw the plaintiff go up to Carroll and raise his cane. The witness then went behind the semaphore, where he could not see the plaintiff; did not intend to hide from him; made no

remonstrance to the egg-throwing. It was in evidence on the part of the plaintiff that the crowd throwing the eggs had been in the witness' office and that they came out together with the witness. The witness had denied this, and had testified that he saw no eggs thrown. It was further in evidence that two eggs were thrown after the witness saw the plaintiff getting eggs from his collar. Taking the whole testimony together, the fact elicited from Ramsour that he was laughing at the time and under the circumstances, was competent evidence to be considered by the jury, bearing upon the question whether he was aiding, abetting and encouraging the crowd in throwing the eggs, or failing to discharge his duty to protect the plaintiff.

It will be observed that the plaintiff declares in two causes of action: the first charging active participation in the assault, and the second, that they neglected, failed and refused to restrain the conduct of the persons making the assault, or in any manner interfere with them, or to protect or offer protection to the plaintiff against said assaults, etc. Certainly the fact testified to by him was relevant to the second cause of action. It could not successfully be contended that the agent of a railroad company could, under the circumstances testified to by the witness, pursue the course which he describes without a violation of duty to the passenger who was entitled to his protection, or at least to some effort to protect him after he saw the conditions by which he was surrounded. It is true there was much conflicting evidence in regard to these matters, but in the light of the charge the jury have found the fact to be as contended by the plaintiff. The fact that his Honor stated that it was competent to affect the credibility of the witness cannot affect the right of the plaintiff to have it considered by the jury in any other light to which he was entitled. The learned counsel for the defendant earnestly insists that this ruling is in conflict with the case of *Phifer v.*

Railroad, 122 N. C., 940. In that case the issue was directed to the inquiry of negligence. The plaintiff was asked the question: "Were you careful?" *Mr. Justice Montgomery,* speaking for the Court, says: "The answer to the question was one of opinion merely, and whether the plaintiff was careful while engaged in his work upon the trestle was not a matter of expert testimony, but of judgment and common experience to be passed upon by the jury upon a detailed statement to them of the facts and circumstances connected with his conduct on that occasion." With reference to the contention of counsel, there is a marked distinction between the two cases. Whether or not a man was laughing and at what he was laughing are not expressions of opinion, but are statements of fact. The answer to this question does not involve, certainly in common parlance, any detailed statements of facts. It simply describes the frame of mind, attitude and feeling in respect to the transaction which was being investigated. Surely no objection could be made to asking a witness whether he was crying, whether he was mad, whether he was standing still or moving. These and like questions are competent for the purpose of showing the relation which the witness bore at the moment to the transaction and the parties thereto. The Court well decided that whether or not a man was careful depended not upon his own opinion, but upon the statement of facts, conduct, attitude, etc., from which the conclusion was to be drawn by the jury. After the most careful consideration we are of the opinion that the exception cannot be sustained.

The next exception states "that there was no testimony to show that Ramsour, the agent, knew that any assault was contemplated, nor that it was made, until it was actually made, when he was further from the crowd than the plaintiff was; and all the evidence shows that with the means at hand it could not have been possible for him to have prevented it."

There was evidence from which the jury might have inferred that Ramseur knew or had reason to apprehend that some assault upon the plaintiff was contemplated by the parties who came to the station. The plaintiff testified that, while he was walking up and down at or near the track, he saw some people coming from the direction of Shelby towards the station, walking very rapidly; that they went into the station somewhere; that there were three doors on that side next to the track; that one door entered into the private ticket office and another into the ware-room; that these people would go into one of these doors, his recollection is, the middle door, stay in there a little while, and then line up on the platform and laugh and talk among themselves, nudge each other with their elbows, eyeing the plaintiff; that he paid very little attention to it, and that a remark of Mr. Webb called his attention to it more than anything else; that when the train was announced the door of the office, or room in which these people were, was opened and a man "with books or papers" of some kind came out, and the crowd came out with him; some came out in front of him; these were the men who threw the eggs; the man with the "books or papers under his arm" came out in the midst of the crowd and the crowd lined up, all except the man with the books and papers under his arm; that he walked in the direction of the end of the platform towards Charlotte. There was evidence to the effect that Ramseur was the man with the books and papers. This evidence, if believed by the jury, was sufficient to justify the inference that the agent knew, or had reasonable grounds to believe, that some assault was about to be made upon the plaintiff. It is true that the agent denies all of this, but we are not passing upon the weight of the evidence.

The next assignment of error is directed to what is said in regard to the action of the Court during the trial. The opin-

ion filed at the last term disposes of this phase of the case and there is no necessity for a further discussion of it.

The other exceptions are directed to the suggestion that Ramseur was sixty feet from the plaintiff and as far or further from the crowd as the plaintiff, and that there was no available means of stopping the egging or laughing and jeering. His Honor fairly submitted this aspect of the case to the jury, and their verdict will not be disturbed.

It is further assigned as error that the Court considered the evidence that Thrower, the conductor, was within fifteen or twenty feet of the plaintiff and offered no protection, and did not consider all of the evidence that he was much further from the crowd than the plaintiff was, and that the conductor was too far from the crowd to afford protection. The deposition of Thrower, the conductor, was read without objection, and no instructions were asked by the defendant in regard to his testimony or his conduct, nor was any reference made to it by his Honor in his charge. The case was tried, evidently, upon the conduct of Ramseur and Carroll. If there was anything in the testimony of Thrower, which the defendant regarded as injurious, or if it desired the Court to withdraw any part of the testimony, or specially charge the jury in regard thereto, it should have so requested.

This case, while one of first impression, and we think it not improper to say we sincerely trust of last occurrence, has received the most careful consideration. This Court deals entirely with the question as to the liability of the corporation, without regard to the active actors in the transaction except in so far as the defendant's duty is concerned. Upon the well-settled principles enunciated by this Court and sustained by the authorities, there is no reversible error in the record, and the petition to rehear is dismissed.

Petition dismissed.

WALKER, J., concurs in the concurring opinion.

BOLES v. CAUDLE.

(Filed November 24, 1903.)

1. SPECIFIC PERFORMANCE—*Contracts—Non-suit—Equity—Const. N. C., Art. 4, sec. 1.*

In an action for the specific performance of a contract, the court cannot non-suit the plaintiff, unless, admitting the evidence to be true, with all inferences favorable to plaintiff, he is not entitled to relief.

2. SPECIFIC PERFORMANCE—*Contracts—Questions for Jury—Questions for Court.*

In an action for the specific performance of a contract, controverted facts should be submitted to the jury, but the trial judge, on the admitted facts and those found by the jury, should decide whether the plaintiff is entitled to the equitable relief demanded.

3. SPECIFIC PERFORMANCE—*Contracts—Undue Influence.*

Where a contract to convey an interest in property is based on a fair consideration, is not procured by undue influence, its enforcement will not be oppressive and it has been partially performed, its specific performance will be decreed.

ACTION by J. W. Boles against N. L. Caudle, heard by Judge *T. J. Shaw* and a jury, at Fall Term, 1903, of the Superior Court of STOKES County. From a judgment for the plaintiff the defendant appealed.

Carter & Lewellyn and *Watson, Buxton & Watson,* for the plaintiff.

W. W. King, for the defendant.

CONNOR, J. The defendant N. L. Caudle, on the 9th day of June, 1888, in consideration of one hundred and fifty dollars to be paid to her in eight annual instalments, executed a paper-writing purporting to convey, assign and transfer to

the plaintiff all the right, title and interest which she then had or should thereafter have in the property and estate of her grandfather, George H. Crouse. Thereafter the said George H. Crouse died leaving a will executed February 2, 1898, giving to the defendant an interest in his estate, the value of which is in excess of the amount paid her by the plaintiff. The plaintiff asserted legal title to the interest of the defendant in said estate. The effect of said paper-writing in that respect was passed upon by this Court at the February Term, 1900, 126 N. C., 352, when *Furches, J.*, said: "The most that it could amount to would be an executory contract to convey. But this not being a contract to convey specific property, the question will be whether a Court can or will compel a specific performance; whether it could amount to more than a breach of contract, which would sound in damages, if it is such a contract as can be enforced." The judgment of the Court below declaring the plaintiff to be the owner of the defendant's interest in the estate of the grandfather was reversed by this Court, and a new trial awarded. The plaintiff thereupon amended his complaint and demanded specific performance of the contract. The defendant filed an amended answer, alleging "that if she executed the contract it was procured by undue influence, ignorance of its effect, advantage taken of her ignorance, weak and afflicted condition, necessity and poverty, and that said contract is unfair, harsh, unjust and oppressive, and without fair and adequate consideration."

When the cause came on for trial upon the amended pleadings, the plaintiff introduced the paper-writing dated June 9, 1888, proven and recorded April 4, 1899. It recorded a consideration of $150, and contained appropriate words of conveyance and assignment of "all and every part of her claim to all real and personal property, which she is, or may hereafter own in Henry Crouse's estate, as the granddaughter

of said Henry Crouse, of Solomon Crouse's estate," etc. Plaintiff then offered in evidence the will of said Crouse, dated February 2, 1898. The only portion material to this appeal is a gift of his son Solomon's part of the estate to his children, giving two daughters $100 each, with the provision that "N. L. Caudle is to have the remainder of my son Solomon's part of my estate and J. W. Boles has bought her interest in my estate."

The plaintiff testified that he married the daughter of George H. Crouse. There were seven children. Solomon was killed in the army, leaving three children. George H. Crouse died August 1, 1899. He saw defendant at the Crouse home during the spring of 1888. While he was at the wood-pile defendant came to him and proposed to sell her interest in her grandfather's estate. Witness told her that he would "study about it." She insisted, and said she would take $150. That she did not want it all at once; that it could be paid in small payments. That she and her grandfather had been talking about it. Witness did not buy it then. In about three months George H. Crouse came to his house and said that at request of defendant he had tried to sell her interest to Wesley Crouse; that he would not buy and she had got him to come to see witness. Crouse said that he would see that witness did not lose anything by it; that he would fix it in his will. Crouse told witness that he did not know the worth of the estate. He said that defendant was going home in a few days and wanted the paper fixed up. Crouse had the paper written and had defendant to sign it. Witness gave him notes for the $150. That he has paid all of the notes except the last, for which the defendant refused to accept money. At the time of the purchase witness thought that there was but little profit in it. Defendant told witness that she was glad he had bought. She went blind some time after the sale. She said six years after the sale that she was

glad she had sold; that the money came in good time. Witness was not present at the time the paper was signed. The value of Crouse's estate increased very much after sale by defendant. Witness paid interest on the notes. It appeared from tax lists that Crouse listed, in 1888, $2,176 worth of property; in 1899, $4,391.

Defendant testified that she was thirty-nine years old; that she was one year old when her father was killed; that her husband died fourteen years ago and she went to her grandfather's for the first time in sixteen years, and while at her grandfather's he said that he had tried to sell one-third of what was coming to her father for $150, and thought it best to sell, as the witness had two small children; her health was bad and she went blind in July; that she had never seen the plaintiff, and she had to do what her grandfather said; that he said the plaintiff had bought her interest in the estate, and Wesley carried her to Butner's and she signed the paper, and they paid her $12.50. She did not know the contents of it, and thought it was for Boles to have $150 out of her father's estate; that was what her grandfather told her. In a short time afterwards the plaintiff paid another note; he sent her two payments during two years, and her grandfather wrote her that the plaintiff was shaving his notes; he shaved six notes and paid others in full; she stayed at her grandfather's nine years and went to see the plaintiff once during that time. The witness denied the conversation with the plaintiff. Her grandfather paid her the notes. After her grandfather died, Key, the plaintiff's son, brought her $25 and said that counsel said it was best for her to take it. At the time she executed the paper her financial condition was bad. Had no real estate or any other property. The defendant showed value of Crouse's estate. Plaintiff introduced other testimony tending to corroborate his own. The executor testified that Solomon's share was worth $1,173, and he owed the

estate $835. He agreed to knock off interest, which would leave $500. There is some confusion in the testimony in regard to the exact value of the share coming to defendant. The foregoing is substantially the testimony. The defendant requested the Court, upon the entire evidence, to non-suit the plaintiff. This was refused and defendant excepted. His Honor submitted issues to the jury to which they responded as follows:

1. Did the defendant N. L. Caudle execute the paper-writing set out in the complaint? Answer, Yes.

2. Was the execution of said paper-writing procured by the undue influence of George H. Crouse or any other person? Answer, No.

3. Was the consideration of said paper-writing a fair consideration for N. L. Caudle's interest in her grandfather's estate at the time of the execution of said paper-writing? Answer, Yes.

4. Would the specific performance of said contract be oppressive? Answer, No.

5. Did the plaintiff perform his part of said contract as alleged? Answer, Yes, all but $25.

6. Is the plaintiff ready, able and willing to carry out his part of said contract? Answer, Yes.

There was no exception to any part of the charge.

The only question thus presented for review is whether upon the whole evidence the Court should have decreed specific performance of the contract. The plaintiff, prior to the adoption of the Constitution of 1868 and The Code of Civil Procedure, would have filed a bill in the court of equity, asking for a decree enforcing specific performance of what the Court has declared to be an executory contract. The cause would have been heard upon depositions and the Chancellor would, in the exercise of a sound judicial discretion, have made a decree. By our Constitution, Article XV, section 1,

all distinctions between actions at law and suits in equity are abolished, and but one form of action is provided. "The remedy for the enforcement of all kinds of contracts" is now a civil action. *Mitchell v. Henderson,* 63 N. C., 643.

This change in the law of procedure, it is said by this Court in a number of cases, does not destroy or merge legal and equitable rights, but as all controversies at law are to be tried by the ancient mode of trial by jury, it has been uniformly held that issues of fact raised by pleadings in actions for the enforcement of equitable rights must be tried by the jury unless waived. *Dillard, J.,* in *Chasteen v. Martin,* 81 N. C., 51, says: "But under the Constitution and The Code all distinctions between actions at law and suits in equity being abolished, and there being now but one form of action, the Judge does not now try and pass on facts put in issue on the pleadings. It is the constitutional right of the parties, as well as the statutory provision, that such issue shall be passed upon by a jury except upon waiver." *Ely v. Early,* 94 N. C., 1. The Court should not, therefore, take the case from the jury and non-suit the plaintiff, as requested by the defendant, unless he could maintain the proposition that, admitting the entire evidence to be true, with all inferences to be drawn from them most favorable to the plaintiff, he was not entitled to relief. The defendant's counsel in an excellent brief and argument made before us contends that such is the law. He cited a number of authorities sustaining his position that specific performance is not a matter of right, but rests in the sound judicial discretion of the Court. The reported cases, English and American, fully sustain this principle. This Court has frequently announced and been guided by this doctrine of equity. In *Leigh v. Crump,* 36 N. C., 299, *Gaston, J.,* says: "The specific performance of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the Court. Although it be valid at law, and, if it

had been executed by the parties, could not be set aside because of any vice in its nature, yet if its strict performance be under the circumstances hard and inequitable a court of equity will not decree such performance, but leave the party claiming it to his legal remedy." While this is true, it is equally true that "when the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to award damages for its breach." Pomeroy Eq., sec. 404. The question is ably discussed and the authorities reviewed in *Semour v. Delancy,* 3 Cowan, 445; 15 Am. Dec., 270. The note to this case contains a full and exhaustive history of the doctrine of specific performance as applied by Chancellors in England and in this country. That a court of equity will specifically enforce a contract to sell and convey an expectancy, as the interest which a child or grandchild may have in the estate of his ancestor, is settled by the decisions of this Court. *Battle, J.,* in *McDonald v. McDonald,* 58 N. C., 211, 75 Am. Dec., 434, in speaking of a contract of this character, says: "It follows that he did not have anything which he could assign or transfer to another either at law or in equity. But he had right to make a contract to convey whatever interest he might in future have in his cousin's property, and such contract, when finally made upon a valuable consideration, the court of chancery will enforce whenever the property shall come into his possession." See also *Mastin v. Marlow,* 65 N. C., 703; *Tucker v. Markland,* 101 N. C., 427; *Foster v. Hackett,* 112 N. C., 556; *Wright v. Brown,* 116 N. C., 28; *Brown v. Dail,* 117 N. C., 41. The jury having found upon competent evidence that the contract was upon a fair consideration and was not procured by any undue influence, that the plaintiff had performed his part

thereof and that its specific performance would not be oppressive, it would seem that the conscience of the Court, thus enlightened, would find no difficulty in granting the plaintiff a decree. We do not intend to hold that, notwithstanding the finding of the jury, the Court under our judicial system was compelled to grant specific performance if it was harsh, oppressive or inequitable. This would be to surrender to the jury a most important function and duty of the Judge. It is not clear that the fourth issue should have been submitted to the jury. They may, upon issues properly framed, inform the Court in respect to the controverted matters of fact, but it is the duty and right of the Court to say, upon the admitted facts and those found by the jury, whether in the exercise of a sound judicial discretion the plaintiff is entitled to the relief sought. It cannot be that the change in the procedure wrought a destruction of the principles of equity jurisprudence built up by the great Chancellors of England and this country. After a careful review of the evidence, we think that the verdict of the jury is in accordance with the truth of the controversy, and that there is no good reason why the judgment rendered should not be sustained. We could not, in view of the fact that the plaintiff has paid all of the purchase money except $25, which he has tendered and is ready to pay, refuse him any relief in equity and leave him to an action at law for breach of the executory contract, when it is apparent that the defendant is insolvent. It is evident that to compel the defendant to repay the money with interest would leave her but a small pittance, and be of little real value to her. The grandfather, who seems to have had the best interests of the defendant in mind, knew best what her probable interest in his estate would be worth, and advised making the sale for $150. We cannot see that as matters then stood the amount was not a fair consideration. There is no evidence of any influence whatever exerted by the plaintiff upon the defendant. He

seems to have been urged to make the purchase by the grandfather. While we would not hesitate to hold the plaintiff to strict proof of the facts upon which his claim to relief is based, and refuse relief where it was reasonably doubtful whether, in accordance with the principles of equity, he was entitled thereto, we cannot so far interfere with the freedom of contract as to hold that in a case like this he is not entitled to relief.

Contracts for the sale of expectancies and drafts upon the future are not favorites of courts of equity, and will be sustained only when shown by those claiming under them that they are entirely fair and free from any vitiating element. Children should not be encouraged to spend their inheritance in advance, or to speculate upon the death of their fathers. It may be that in these days the evil effects of living upon the future demand a stricter investigation by the Courts of contracts of this character. In addition to the evil effect upon the habits and mode of life of the people, such contracts are calculated to weaken the bonds of affection and degrade the most sacred relations of life to a mere pecuniary basis.

We sustain this judgment upon the finding of the jury and the facts in this case, without intending to depart in the slightest degree from the principles by which courts of equity have always been guided in such cases. We have not overlooked the exception to the refusal to submit issues tendered by the defendant. We think those submitted presented every phase of the controversy.

Judgment affirmed.

COX v. DOWD.

(Filed December 1, 1903.)

1. ASSIGNMENTS—*Married Women—Stocks—Husband and Wife.*

Where a *feme sole* assigns stock in blank and after marriage new stock is issued to her, and she assigns the same to the same parties without assuming control thereof, such assignment is valid without the consent of the husband.

2. SURETYSHIP—*Release—Extension—Stocks—Assignments—Married Women.*

Where a person assigns stock in blank and allows another person to use the same as collateral without any knowledge on the part of the person to whom given as collateral as to any conditions relative to the assignment, is not released by an extension of time in payment of the debt for which it is collateral.

ACTION by Laura B. Cox and H. J. Cox against Herman Dowd, heard by Judge *B. F. Long*, at April (Special) Term, 1903, of the Superior Court of MECKLENBURG County. From a judgment for the defendant the plaintiffs appealed.

James A. Bell, for the plaintiffs.
Jones & Tillett and *T. C. Guthrie*, for the defendant.

CLARK, C. J. The facts were found by the Judge by consent of parties, and from them it appears that in 1896 the *feme* plaintiff, then unmarried, living in Georgia but owning eight shares of stock in a cotton mill located in this State, signed at her home in Georgia a transfer on the back of the certificate of stock in blank and sent the certificate to her brother, A. C. Craig, at Charlotte, N. C., who wished to use it as collateral for a loan of $800 for three months from a bank at that place. This loan was renewed from time to time till 5 October, 1898, when her brother secured a loan of $2,000 from Mrs. L. J. Dowd, putting up said certificate

with a chattel mortgage on other property therefor, and out of the proceeds paid off the $800 loan to the bank, Mrs. Dowd having no notice of any limitation (if any) upon the authority of the holder conferred by the endorsement of the transfer of the stock in blank. In December, 1898, the plaintiff, having married, wrote her brother to have her certificate of stock changed by having it re-issued in her married name (Cox), and for this purpose the certificate was temporarily withdrawn with the understanding with Mrs. Dowd that the new certificate, when issued to Mrs. Cox, would be endorsed by her in blank as before, and would be returned and stand in the same plight and would be the same security as the certificate for which it was re-issued. This was done. The husband of Mrs. Cox did not join in said new endorsement in blank, which was also made in Georgia. At that time the plaintiff had no knowledge where or for what amount her stock was pledged. This note was renewed in October, 1899, for one year, interest being paid in advance. In December, 1899, this note, with the aforesaid collaterals, was assigned to the defendant, who, in October, 1900, renewed it for another year on the same collaterals, and the balance thereon has since been reduced by sale of the other collaterals to $829, principal and interest. When the loan of $2,000 was made by Mrs. Dowd, and at its renewal in 1899 and in 1900, the present owner of the note, the defendant Herman Dowd (who was Mrs. Dowd's son) received from Craig, the assignee of the certificate, a promise, as part consideration of the loan and its renewal, to give him, said Herman Dowd, employment. Said Herman Dowd, when the certificate of stock was re-issued in plaintiff's married name in December, 1898, knew that the stock was hers. In 1901 A. C. Craig filed his petition in bankruptcy and was discharged. When said Craig used the certificate as collateral with the bank, and afterwards with the Dowds, neither the latter nor the bank had notice of

any restrictions upon his powers to use the same, nor did Mrs. Cox, either before or after marriage, have any notice of her brother's dealings and use of the certificate.

The question of the *feme* plaintiff's powers or disabilities as a married woman has no place here. She assigned the certificate of stock in blank while *feme sole,* and she never resumed control or possession of it at any time. After her marriage, at her request, the certificate was re-issued to her in her married name and was sent to her 6 December, 1898, solely to have the same endorsement placed on it as was on the former certificate, and for no other purpose. She asserted no control or possession, and returned the certificate transferred in blank, as before, to her brother, and the defendant's counsel, in his brief, properly admits that Mrs. Dowd's lien on said stock was valid at the maturity thereafter of the $2,000 note, 5 October, 1899.

The only question, then, is whether the renewal then and again in October, 1900, for a specified time, prepaying interest, and for the further consideration of the employment of Herman Dowd, did not release the security afforded by the deposit of the plaintiff's stock. This would be the case if her stock had been put up as security for her brother's debt, the amount of said debt and the date of its maturity being specified. But here the certificate was assigned in blank, without any restrictions, and was left thus for years in the hands of the plaintiff's brother, to do with as he pleased, without any inquiry or protest from the plaintiff or any attempt to regain possession or assert control. The unrestricted endorsement in blank, coupled with such conduct, amounted to an agreement on her part that this certificate might be continually held by her brother for his own benefit and for such use as he might see fit to make of it until she gave the holder of it notice of a change in the authority her brother had. When Mrs. Dowd made the $2,000 loan in October, 1899,

she had no notice of any restriction upon the assignment in blank of the certificate by the plaintiff, and if Craig had then filled it out with Mrs. Dowd's name it would have been a valid conveyance. She took the collateral as his security, not as a security given by Mrs. Cox, and the lien thus acquired was not changed by any subsequent notice that Mrs. Cox claimed any interest in the stock, unless, perhaps, the principal of the loan had thereafter been increased. The subsequent dealings were, in view of the lien, acquired upon the stock as Craig's, in October, 1899, and that lien still rests upon the stock to the extent of the $829 and interest, due and unpaid, of the debt contracted in October, 1899.

The recent opinion in *Havens v. Bank,* 132 N. C., 214, especially what is said at pages 222-225, renders it unnecessary to discuss the effect of a transfer in blank of a certificate of stock, which it is there held "passes the entire title, legal and equitable, in the shares," notwithstanding any requirements in the charter or by-laws that the stock shall be transferrable only on the books of the corporation. Besides cases there cited, we may add *Hirsch v. Norton,* 115 Ind., 341; 2 Thompson Corp., sec. 2368.

In holding that the certificate should be sold and out of the proceeds that the indebtedness of $829 and interest still due the defendant should be paid, there was

No error.

SALMONS v. WESTERN UNION TELEGRAPH CO.

(Filed December 1, 1903.)

TELEGRAPHS—*Contracts—Negligence—Damages.*

In this action against a telegraph company for damages for delay in the delivery of a message, the facts render the company liable only for nominal damages.

CLARK, C. J., and DOUGLAS, J., dissenting.

ACTION by L. J. Salmons against the Western Union Telegraph Company, heard by Judge *Walter H. Neal,* at June Term, 1903, of the Superior Court of WILKES County. From a judgment for the plaintiff the defendant appealed.

W. W. Barber, for the plaintiff.
Glenn, Manly & Hendren, for the defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant damages for its negligent failure to deliver a telegram. In the complaint it is alleged that the plaintiff agreed with a man by the name of Swaim, a licensed distiller of whiskey, to pay the revenue tax on a certain lot of whiskey which had been distilled by and belonged to Swaim, and that the plaintiff had sent Foote to Statesville to buy the stamps; that after Foote had gone to Statesville to procure the stamps the plaintiff learned of some irregularities connected with the whiskey, and in consequence thereof delivered to the defendant's agent at Roaring River, N. C., a telegram to J. A. Cooper in the following words: "Tell A. V. Foote if he has not had the stamps issued for J. M. Swaim not to have it done." That the telegram was kept at the receiving station, through the negligence of the operator there, and did not reach the sendee at Statesville until after Foote had bought

the stamps; that the whiskey was "spirited away"—stolen—and the stamps were useless. By consent of the parties it was agreed that his Honor should hear the testimony, find the facts and adjudge the rights of the parties. Upon the evidence his Honor found the following to be the facts:

1. That on the 24th day of May, 1900, one Swaim was the owner of a lot of distilled spirits which was in a government warehouse, which had not been stamped as required by law.

2. The plaintiff Salmons had no interest whatever in said spirits, and Swaim, the owner, was a government distiller.

3. Swaim came to plaintiff and asked him for the money with which to pay the taxes due the government on the said spirits, and plaintiff agreed to let him have the sum of two hundred and three (dollars) and sixty-one cents ($203.61) for that purpose, and the said Swaim was to repay the said amount as soon as he could sell the spirits after it had been stamped. Swaim had agreed to sell the spirits to one Sowers. A man by the name of Foote was going to Charlotte, and on his return was to stop at Statesville on some business. Statesville is the stamp office for this Internal Revenue District. The plaintiff asked Foote if he would take the "withdrawals" down to Statesville and get the stamps for the whiskey. "Withdrawals" are certificates which are presented to the Collector, and he thereupon issues the stamps to correspond. Foote consented to do this, and the plaintiff drew his check on the National Bank of Statesville, payable to said Foote, for the said sum of two hundred and three and 61-100 dollars, and gave it to Foote, to be applied in the purchase of the stamps. Foote was to be in Statesville on the 25th day of May, 1900, at which time he was to purchase the stamps. On the afternoon of the preceding day, to-wit, May 24, 1900, the plaintiff received information that there were irregularities at Swaim's distillery, making the spirits liable to seizure. The plaintiff then went to the telegraph office of the defendant company

and asked defendant's operator if he could send a message through to Statesville at once. The plaintiff told the operator that the message was important and to send it off at once, and he said he would do so. So on the 24th of May, 1900, at 6:48 P. M., the plaintiff delivered to defendant the following message:

MAY 24, 1900.

To J. A. COOPER,
Statesville, N. C.

Tell A. V. Foote if he has not had stamps issued for F. M. Swaim to not have it done. L. J. S.

The charges, 25 cents, on the above message were prepaid. Foote reached home next evening, having purchased the stamps and without having received any message not to make the purchase of the stamps.

4. Swaim went to plaintiff's home and asked him to furnish this money. Plaintiff agreed to do so, and the plaintiff was to loan this money to Swaim, and in accordance with this agreement gave the check to Foote to go to Statesville to buy the stamps for Swaim. At this time the whiskey was in the government warehouse, but the spirits was "spirited" away about that time and could not be stamped. When spirits once goes into a warehouse it must be stamped.

5. Cooper, the addressee in the telegram, is the president of the bank on which the plaintiff made his check.

6. Cooper, president of the bank, received the telegram at 9:50 A. M. on the morning of May 25th, 1900, after Mr. Foote had gone to the bank the same morning and had Mr. Cooper, the president of the bank and addressee in the telegram, to certify that plaintiff's check was good, so the internal revenue agent would accept the check in lieu of money.

7. That as soon as Mr. Cooper received the telegram he

sent the same at once to Mr. Foote at the revenue office, but it was too late, as the purchase of the stamps had already been made.

8. If the telegram had been received by Cooper before Foote went to the bank he would have delivered the said telegram to Foote.

(This finding (8) is based upon that part of Cooper's statement to which the defendant objected and excepted in apt time.)

9. The president of the bank, Cooper, certified to Foote's check at 8 A. M. on the 25th May, 1900, and the bank opened for business at 9 A. M.

10. Foote did not get any message from Cooper or Salmons.

11. If he had he would not have purchased the stamps.

(The defendant, in apt time, objected to the testimony of Foote on which this finding is based.)

Upon his findings of fact his Honor adjudged that the defendant was guilty of negligence; that the transaction between Swaim and Salmons amounted, under the undisputed facts, to no more than an agreement to make the loan, which the plaintiff could recall at any time, and there was judgment for the amount paid by Foote for the stamps and the costs.

We are of the opinion that his Honor was in error in his construction of the contract between Salmons and Swaim and in granting judgment against the defendant for the amount of the check. Upon the facts found by his Honor it appears to us that he should have ruled as a matter of law that the transaction between the plaintiff and Swaim was a complete one and that the loan was absolute and unrestricted. Swaim came to the home of the plaintiff to borrow money to buy revenue stamps to be placed on certain whiskey which had been distilled by Swaim. The plaintiff agreed to let him have the money for that purpose on the promise of Swaim to

return it after he had sold the whiskey. The plaintiff then drew his check for the exact amount, payable to Foote, who happened to be going to Statesville, to buy the stamps, and Swaim went home. It made no difference that a check was handed to Foote instead of the money. The plaintiff had agreed to lend Swaim the money to buy the stamps, and, as found by his Honor, in accordance with that agreement, gave the check to Foote to go to Statesville to buy the stamps for him. At that time the whiskey was in the warehouse. From the moment the plaintiff handed the check to Foote, according to the agreement between plaintiff and Swaim, the transaction between the plaintiff and Swaim was closed and Swaim became the debtor to the plaintiff for the amount of the check. If there had been any agreement between the parties that Foote was to buy the stamps and hand them to the plaintiff, as that the plaintiff could see that they were put upon the barrels of liquor, or, in other words, if there was any evidence going to show that Foote was the agent of the plaintiff, a different view of the matter might be taken, but there was no such evidence. So far as we can see, the plaintiff did not mistrust Swaim. He lent him the money without security, so far as the record shows. When the agreement to lend the money was made there was nothing to be done between Salmons and Swaim; the stamps were to be bought for *Swaim*, and nothing being said to the contrary in the findings of fact by his Honor, were to be placed by Swaim upon his barrels of whiskey. Under the findings of fact in this case, how can it be doubted that if Foote had abused his trust the plaintiff would not have recovered from Swaim the amount of the check. If so, how can he recover of the defendant? If he could have recovered from the defendant, there is nothing which would keep him from recovering from Swaim also, as we have seen. The defendant, therefore, from this view, owed the plaintiff no duty in reference to the transactions

between Swaim and the plaintiff. The judgment should have been against the defendant on account of its negligence in not sending the telegram, for the amount paid by the plaintiff for sending it, and the plaintiff's expenses attendant upon the sending of it.

New trial.

CLARK, C. J., dissenting. It is found as a fact that Swaim went to the plaintiff's house and asked him for money to buy stamps; the plaintiff agreed to this and gave a check to Foote to buy the stamps in Statesville. These stamps are really and simply governmental tax receipts, and when the whiskey was stolen before these receipts were affixed, it was the same as if a house had been burned after the sheriff had given his receipt for taxes. The plaintiff agreed to furnish money to pay these taxes, and from the surrounding circumstances it is tolerably plain that he was not willing to hand the cash over to Swaim, but preferred to send him, instead, the stamps or tax receipts. Whether he did this through caution or at request of Swaim the fact that he was to pay the tax for Swaim is a reasonable inference that might have been drawn by the jury, and which the Judge, acting by consent as a jury, does draw, for he finds as a fact that the transaction between Swaim and Salmons, upon the undisputed facts, was "an agreement to make the loan which the plaintiff could recall at any time." The plaintiff has never delivered any money or money's worth to Swaim. There is no evidence nor finding that Foote was Swaim's agent. He was the plaintiff's agent, according to the evidence, for the check drawn by the plaintiff was made payable to Foote, not to Swaim. Hence, Swaim acquired no control over the check. He could not have drawn the money, nor have gotten possession of it in any way, and never did receive the money nor have it or the check in his control. If the plaintiff had put the money in custody of a

common carrier directed to Swaim or the collector, he would, on learning of the destruction of the property, have had a right of stopping *in transitu*. Here, the check being signed by the plaintiff and payable to Foote, under instructions from the plaintiff, not from Swaim, to draw the money and use it for the purchase of stamps, Swaim had no control over it and could neither by telegraph nor in person have controlled Foote. The plaintiff still had the control of the matter. He could stop Foote's drawing the money, either by message sent to him or by notifying the bank not to pay the check. He chose the former method as more courteous and proper. By telegram delivered to the defendant at 6:48 P. M. he requested a friend at Statesville, only some thirty-five miles away, to notify Foote not to buy the stamps, *i. e.*, not to get the tax receipts. By gross negligence of the defendant the message was not delivered till 9:50 next morning. The check was not paid till after 9 o'clock and immediately after Foote bought the stamps, *i. e.*, paid the tax. The plaintiff has lost the sum thus paid out. This loss would not have occurred but for the gross neglect of the defendant to discharge its duty by prompt delivery of the telegram sent by the plaintiff, for which duty it has received chartered privileges and for which in this instance it accepted the plaintiff's money. Swaim has never received any money from the plaintiff, and had no control over cashing the check. He had no power to stop it and did not attempt to do so. The defendant contracted with the plaintiff to deliver promptly a message which would have prevented the cashing the check (and the payment of the proceeds to the Collector), and is liable to the plaintiff for the amount he has lost by such default. The judgment below should be affirmed.

DOUGLAS, J., concurs in the dissenting opinion.

WILMINGTON v. McDONALD.

(Filed December 1, 1903.)

1. PLEADINGS—*Time to Plead—Findings of Court—Appeal.*

A finding by the trial judge that the time for filing an answer has expired is conclusive, and any extension of the time is within the discretion of the court.

2. EXCEPTIONS AND OBJECTIONS—*Appeal.*

An exception that "the court erred in rendering said judgment" is too general to be considered on appeal.

3. LIMITATIONS OF ACTIONS—*Pleadings.*

The statute of limitations can only be raised by answer.

4. TAXATION—*Parties—Appeal.*

Where a judgment for taxes includes the poll tax of one not a party to the action, this portion will be stricken out on appeal.

5. TAXATION—*Taxes—Interest.*

A judgment for taxes should include interest on the amount due.

ACTION by the City of Wilmington against Bridget McDonald and others, heard by Judge *R. B. Peebles,* at January Term, 1903, of the Superior Court of NEW HANOVER County. From a judgment for the plaintiff the defendant appealed.

W. J. Bellamy and *Shepherd & Shepherd,* for the plaintiff.
L. V. Grady, for the defendants.

CONNOR, J. This action is prosecuted by the plaintiff, the City of Wilmington, for the purpose of collecting certain taxes assessed against the property of the defendants specifically described in the complaint. The plaintiff alleges that the land was lawfully assessed for taxation by said city at the valuation and the rate set forth for years enumerated, amounting

to $534.38. The complaint also alleges that certain taxes were levied upon the "personal property and poll of the defendants, Hugh McDonald and Bridget McDonald, amounting to $18.35." Hugh McDonald is not a party to this action. The complaint alleges: "That under the laws providing for the collection of taxes by the City of Wilmington the taxes for each and every year became due and payable on or before the 31st day of December of each and every year for which said taxes were levied and assessed. The judgment demanded is that the plaintiff recover the amount of said taxes and interest; that the amounts so due be declared a lien upon said property, and that a sale thereof be ordered," etc. The complaint was duly verified.

The case on appeal states that on the call of the motion docket the plaintiff asked for judgment against the following of said defendants: Bridget McDonald, William Sheehan and wife, William Smithson and wife. The said defendants, through counsel, appeared and asked leave to file an answer to said complaint. The Court refused the said defendants the right to file an answer, for the reason that the same was not filed within the time prescribed by law or by the rule adopted by the members of the bar of said county. Thereupon the Court rendered judgment as demanded in the complaint.

The defendants moved his Honor to set aside the judgment upon the ground that the same is void in law and contrary to the statutes and the charter of said city, and upon the further ground that his Honor had no authority in law to render the same. His Honor declined to allow said motion, and defendants appealed. They assign as error his Honor's refusal to permit them to file an answer. The finding of fact that the time for filing answer had expired is conclusive, and it is too well settled to require or justify discussion that the extension of time is a matter within the discretion of the Court. *Boddie v. Woodard,* 83 N. C., 2; *Reese v. Jones,* 84 N. C., 597.

"The Court erred in rendering said judgment." The exception is too general. There is no suggestion in the assignment as to the respect in which the Court erred. The defendants' counsel relied in this Court upon the bar of the statute of limitations, especially of the provision in the charter of the city (1858-'59, chapter 198). The statute of limitations can only be raised by answer, but it would seem that this Court has held, in *Wilmington v. Cronly,* 122 N. C., 383, that if pleaded the statute would not have availed the defendant. As no answer was filed and we find no error on the record, we affirm the judgment without deciding several questions argued before us. We find, however, that the judgment includes the poll tax of Hugh McDonald, who is not a party to the action, and it is not alleged that he owned the property sought to be sold. This amount should be stricken out. We see no reason why the amount due as taxes should not bear interest. The assessment has the force and effect of a judgment and carries interest under the statute.

Affirmed.

SUMMERLIN v. CAROLINA AND NORTH-WESTERN RAILROAD COMPANY.

(Filed December 1, 1903.)

1. EVIDENCE — *Expert Evidence — Hypothetical Questions — Negligence—Personal Injuries.*

An expert must base his opinion upon facts within his own knowledge or upon the hypothesis of the finding by the jury of certain facts recited in the question.

2. EVIDENCE—*Harmless Error—Appeal—Negligence.*

Where an objection to evidence is improperly sustained, but the same evidence is subsequently admitted, it is harmless error.

3. EXPERTS—*Exceptions and Objections—Witnesses.*

Where a witness has testified as an expert to several material matters, a general objection to a particular question thereafter is insufficient to raise the question of his competency as an expert.

ACTION by Effie Summerlin against the Carolina and North-western Railroad Company, heard by Judge *T. J. Shaw* and a jury, at February Term, 1903, of the Superior Court of GASTON County. From a judgment for the defendant the plaintiff appealed.

A. G. Mangum, for the plaintiff.

J. H. Marion, O. F. Mason and *George W. Wilson,* for the defendant.

WALKER, J. This action was brought by the plaintiff, who is a minor and sues by her next friend, to recover damages for injuries alleged to have been caused by the defendant's negligence. The case turns upon the correctness of the rulings of the Court upon the evidence, and so much of the testimony of the plaintiff as we need consider was as folows:

J. W. Summerlin testified that he and his wife and child (the plaintiff) were passengers on the defendant's train from Gastonia in this State to Yorkville, S. C., on the 13th day of June, 1901, and that when the train arrived at Yorkville they tried to get off "as quick as they could, and he and the child got off, but his wife was at the door and was about to step off the car, when the train gave a jerk and she fell on the child and hurt it. The train moved forward as she attempted to leave the car, and she was thrown off behind and between the rails and fell on the child. The child was four years old last August. It has not as good use of one of its legs as of the other, one being smaller than the other." He first noticed the injury to her limb, two or three months after the fall, when he and his wife went to get a pair of shoes for the child. He

returned from Yorkville the following September. No physician was called to examine the child until June, 1902, when Dr. Reid examined it about the time this suit was brought.

Dr. Reid, witness for the plaintiff, testified that he examined the child in June, 1902, and saw that it had a limping gait. One of its legs was smaller than the other, but otherwise it was healthy. He moved the limbs and found a shortening behind and some other defects. There was the appearance of a green-stick fracture after the limb had time to heal. It was not a complete fracture. Dr. Glenn was present when he examined the child and assisted in the examination. He examined it again about a month before the trial, when he found that the muscles had improved a good deal and the limb looked healthier. The plaintiff then proposed to ask this witness the following question: "If the jury find from the evidence that on the 13th of June, 1901, the mother of this child had it in her arms and on the platform of the rear end of the railroad car, and fell from that platform to the road-bed, and during last summer you made an examination of the child and found the condition of the child's left leg and hip as you testified, to what would you attribute those conditions?" The defendant objected to this question; the objection was sustained, and the plaintiff excepted.

The plaintiff then proposed to ask this witness another question in which the facts were somewhat differently stated, but which was substantially the same in form and substance as the first question, and it was also excluded on objection by the defendant, and the plaintiff excepted.

The plaintiff then asked the witness the following question: "If the jury find from the evidence that on June 13, 1901, the mother of this child, with the child in her arms, fell from the rear end of a platform of a caboose car to the road-bed below and fell on the child, and if the jury further find that during the folowing summer the condition of the leg and hip

of the child was as you have described in your testimony, could not these conditions, in your opinion, have been caused by such a fall?" The defendant objected to this question, but the objection was overruled, and the witness answered it as follows: "Yes, it could have been caused by a variety of falls, and could have been less or greater than this. It would certainly have been sufficient to produce a fracture. The fall might not have produced the injury. That part of the child might not have come in contact with anything to cause it."

Dr. Sloan, a witness for defendant, testified to facts tending to contradict Dr. Reid. He stated that he found weakness in the ankle and slight weakness in the knee. In the thigh there was nothing more than the undevelopment of the muscles. There was no evidence of a green-stick fracture. The trouble was congenital. The defendant then proposed to ask the witness the following question: "If the jury should find that on the 13th day of June, 1901, this child had a fall and sustained a green-stick fracture, and no evidence of that fracture had been discovered by the parents of the child for several months afterwards, would you, in your opinion, say that had anything to do with the weakened condition of the ankle or the weakened condition of the knee that you found on the child?" To this question the plaintiff objected; the objection was overruled, and the plaintiff excepted.

The plaintiff then introduced Dr. Glenn, who testified to facts tending to corroborate Dr. Reid, and he proposed to ask this witness two questions, each of which was the same in substance and effect, if not in form, as the questions put to Dr. Reid, and which had been excluded as hereinbefore stated, except that one of the questions required the witness to base his opinion upon the fact as to the "condition of the child at that time" (the time of the mother's fall from the car), in addition to the other supposed facts inserted in the several questions, there being no evidence as to the child's condition

at that time. The questions asked Dr. Glenn by the plaintiff were also excluded, upon objection by the defendant, and the plaintiff again excepted.

The plaintiff then proposed to ask Dr. Glenn the following question: "If the jury should find from the evidence that on the 13th day of June, 1901, the mother of this child, with the child in her arms, fell from the rear end of the platform of a caboose car and fell on the child, and the jury further find that the condition of the child was as testified to, state whether or not, in your opinion, that could have been caused by such a fall?" This question was objected to by the defendant, but admitted by the Court, and the witness answered it in the affirmative.

The questions asked Dr. Reid and Dr. Glenn by the plaintiff's counsel, which were excluded by the Court, were not in accordance with the approved formula, nor were they so framed as to constitute a proper basis for the expression of an opinion by either of the experts.

There is nothing better settled than that a witness can ordinarily speak only of facts within his own knowledge, unless he is an expert, having special scientific knowledge, in which case he may give his opinion, but only upon the facts as they may be found by the jury. It is usual, therefore, to formulate what is called a hypothetical question, which should contain a recital of such facts as may have been testified to by the other witnesses. The party propounding the question may, it is true, so array the facts in the question as to present fully his contention in regard to them, provided there be testimony legally sufficient to sustain a finding of them by the jury. *State v. Bowman,* 78 N. C., 509; *State v. Cole,* 94 N. C., 958; *State v. Wilcox,* 132 N. C., 1120. The proper form of the question is: If certain facts assumed in the question to be established by the evidence should be found by the jury, what would be the witness' opinion, upon the facts

thus found true, of the matter involved and to which the inquiry is directed. *Woodbury v. Obear,* 7 Gray, 457; *Com. v. Rogers,* 7 Metc., 500; 41 Am. Dec., 458. Succinctly stated, the rule is that the expert must base his opinion upon facts within his own knowledge, or upon the hypothesis of the finding by the jury of certain facts recited in the question. *State v. Bowman, supra;* Rogers' Expert Testimony, sec. 27. There is said to be an exception when there is no conflict of evidence upon the material facts, in which case no hypothetical question is necessary. But, while we need not pass upon the correctness of this view, it seems that, at least, the jury must pass upon the credibility of the witnesses, and that the question should be hypothetical, whether there is a conflict or not. Rogers' Expert Testimony, secs. 26 and 31. It is not proper so to frame the question as to require the witness to draw a conclusion of fact, nor to require him to pass upon the effect of the evidence in proving controverted facts, nor should the expert be asked the question in such a manner as to call upon him to decide the very question which will be submitted to the jury. Rogers' Expert Testimony, sec. 26.

Applying these general principles to the particular questions under consideration, we think that those asked the witnesses, Dr. Reid and Dr. Glenn, by the plaintiff's counsel, and which were excluded by the Court, were incompetent as being in violation of the fundamental principle upon which the admissibility of expert testimony rests. They require the witness not to express a scientific opinion upon certain assumed facts, but to invade the province of the jury and to decide the very question in dispute as to the cause of the injury to the child. *Carpenter v. E. T. Co.,* 71 N. Y., 574. It would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a

fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car and not by a fall from any other elevated place, or in any other way that might just as well have produced the same result, it is beyond his competency as an expert to speak upon the subject, for he will then be deciding a fact and not merely giving an expert opinion founded upon a given state of facts.

The plaintiff's counsel, in the argument, relied on *State v. Bowman, State v. Cole* and *State v. Wilcox, supra,* as authorities to sustain his position that the questions were competent and in proper form, but a careful reading of those cases will disclose that the questions asked the witnesses in them were very different in form and substance from the questions asked in this case.

The answer of Dr. Reid to the question asked him by the plaintiff, and which was admitted by the Court, is a good illustration of the distinction we make. When asked, after a recital of the assumed fact, as to the condition of the child, could "the said condition, in his opinion, have been caused by a fall?" he replied, "Yes, it could have been caused by a variety of falls. It could have been less or greater than this. The fall was certainly sufficient to produce a fracture, but it might not have produced this injury. That part of the child might not have come in contact with anything to cause it." The statement of the witness in reply to this question shows the impossibility of giving any definite or reliable answer to the questions propounded by the plaintiff's counsel.

We are further of the opinion that, by Dr. Reid's answer to the plaintiff's second question, the latter got the full benefit of the evidence sought to be elicited by the other questions, as well as the doctors could give it, though the answer in itself may have been somewhat disappointing. The plaintiff's question, which was admitted by the Court, was in proper form

and completely covered the inquiry embodied in all of the interrogatories which were excluded. No harm, therefore, has come to the plaintiff by reason of the exclusion of the other questions put to Dr. Reid and Dr. Glenn, for the latter also testified, in answer to one of the questions asked him, that the condition of the child could have been caused by the fall from the car.

The question asked Dr. Sloan by the defendant's counsel, to which the plaintiff objected, it is now said was incompetent because the witness was not qualified as an expert before he was permitted to testify. This was the ground of objection, as stated in this Court, and the plaintiff's counsel relied on *State v. Secrest,* 80 N. C., 450, and *Flynt v. Bodenhamer,* 80 N. C., 205, but those cases are not in point. In both of them it appeared that objection was made to the witness, that is, to his competency, and not merely to a question propounded to him. It will be observed that in this case Dr. Sloan had testified to several facts before the question, to which objection was taken was asked, and it is apparent from the way the case is stated in the record that the objection below was to the competency of the particular question rather than to the qualification of the witness as an expert. There was no objection made at the time the witness was introduced and before he had testified to several material matters. Objections must be entered in apt time or they will be taken to be waived. We must infer from the record one of three things: (1) that there was evidence of the witness' qualification and that the fact of his being an expert was found by the Court, or (2) that he was admitted to be an expert, or (3) that there was no question made in the lower Court in regard to it. These inferences must be made because we cannot presume error, and the burden is upon the appellant to show it, and in this Court we must assume that every fact was proved and everything done necessary to sustain the ruling and judg-

ment of the Court below, unless it otherwise appears in the record. Nothing appears in this record tending to show affirmatively that the Judge committed any error in respect to the matter we are now considering.

A party cannot be silent while a witness is testifying, as a qualified expert, to matters of opinion which are material to the controversy, and, after he has so testified, object generally to some question which may be afterwards asked him, and then make the point as to his competency for the first time in this Court. If the objection had been made in apt time, we have no doubt the Judge below would have instituted the proper inquiry and found the facts as to the competency of the witness to testify as an expert, and those facts and his ruling thereon would have appeared in the case. This objection is untenable.

The form of the question asked Dr. Sloan was not specially assigned in this Court as a ground of objection. While the question is not in exact accordance with approved precedents in such cases, yet we do not think that there was any substantial or material defect in the form of the question. It particularly called for the opinion of Dr. Sloan as to whether the fall could have caused the weakened condition of the child's ankle and knee, and it must have been so regarded by the plaintiff's counsel, as no mention is made in his brief of any defect in the question itself.

Upon a review of the entire case, we discover no error in the rulings of the Court below, and it will be so certified.

No error.

SUTTON v. BESSENT.

(Filed December 1, 1903.)

1. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Deeds of Trust—Payments—Preferred Creditors.*

A creditor whose debt is secured by a deed of trust is entitled to payment in preference to another creditor who has a subsequent deed of trust, the funds being in the hands of a trustee under a subsequent assignment for the benefit of creditors.

2. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Preferred Debts—Schedules—Acts 1893, ch. 453.*

An assignment for the benefit of creditors, preferring a creditor secured by a deed of trust on the same property, does not provide for a real preference within the act of 1893, requiring the filing of a schedule of preferred debts.

3. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Preferred Debts—Schedules—Acts 1893, ch. 453.*

An assignment for the benefit of creditors, preferring a claim void for want of consideration, does not provide for a real preference within the act of 1893, requiring the filing of a schedule of preferred debts.

ACTION by R. M. Sutton and others against J. C. Bessent and others, heard by Judge *Walter H. Neal,* at March Term, 1903, of the Superior Court of FORSYTH County. From a judgment for the defendants the plaintiffs appealed.

Lindsay Patterson and *Louis M. Swink,* for the plaintiffs.
Glenn, Manly & Hendren, for the interpleader.
J. S. Grogan, for the defendants.

MONTGOMERY, J. It was agreed by all the parties that the Court should find the facts and thereupon adjudge the law upon their rights. The defendant Kennie Rose executed three different deeds of trust to secure certain indebted-

ness in each deed mentioned, upon the same property, to-wit, his stock of goods, wares and merchandise in his store-house in Winston, N. C., and other personal property. The first deed was executed to W. N. Reynolds, to secure a debt of $500 due to R. J. Reynolds, and was registered on November 11, 1893. The second deed was executed to Henry C. Kinsey to secure a debt of $750, due to R. M. Sutton & Co. for goods already sold and delivered to him, and also to secure the payment of other goods that Sutton & Co. might sell to the grantor, and was registered on August 27, 1901. And the third deed was made to J. C. Bessent, and was registered on August 26, 1901. The last deed of trust was in the nature of an assignment for the benefit of creditors generally, and contained a reservation of the debtor's personal property exemption.

His Honor further found as facts that $130 had been paid by the debtor on the Reynolds note; that the deed to Bessent was not executed for the purpose of hindering, delaying and defrauding the plaintiffs R. M. Sutton & Co., or any other person; that the Reynolds debt mentioned in the deed to Bessent was the mortgage debt referred to in the answer of R. J. and W. N. Reynolds; that the debtor, Rose, in reference to the Bessent deed "has not complied with the terms and provisions of the General Assembly, Acts 1893, ch. 453, in that he failed to file any sworn schedule of the alleged preferred debts"; in that last-mentioned deed the following provisions are made: "3. Pay to R. J. Reynolds of Winston, N. C., the amount due on a note for $370, secured by mortgage on the above stock of merchandise. 4. Pay to J. S. Grogan, attorney, of Winston, N. C., $25 for professional services due by acceptance. 5. The balance to be paid and distributed *pro rata* amongst each and every one of my creditors according to their respective claims"; that the entire indebtedness of Rose at the time of his assignment to Bessent was $2,300,

in which is included the debts due to Sutton & Co. and the Reynolds debt. Bessent, claiming as trustee, took possession of the property and has sold it, as we understand from the findings of fact, and has in hand as the proceeds of the sale about $1,200 to be applied as the Court might direct.

His Honor also found as a fact that the debt of $25 due to Grogan "was not a pre-existing debt and was created for the purpose of paying him, the said Grogan, for professional services to be rendered the said Bessent, trustee, in executing the trust."

Upon the facts his Honor concluded as matter of law, first, that out of the funds in the hands of Bessent, Reynolds was entitled to be paid the amount of his debt, principal and interest, and that he was entitled to this payment "by virtue of his mortgage, which was executed and recorded long and prior to the other transactions herein referred to"; second, in the deed of trust made by Rose to Bessent, trustee, Rose reserved his personal property exemption; this exemption not having passed to the trustee remained in Rose, and was still covered by the mortgage or deed in trust to Kinsey, trustee, for R. M. Sutton & Co.; so, then, after paying the Reynolds debt, Sutton & Co. are entitled to receive $500 of the fund; third, the deed in trust from Rose to Bessent is not void except as to the alleged preferred creditor, Grogan. If A makes a deed of trust to B, prefers certain creditors, M and N, having at the same time other creditors, X, Y and Z, and the grantor A fails to file his sworn statement or schedule provided for by the act of 1893, the deed will be void so far as N and M are concerned, but it will be good as to X, Y and Z; that is to say, the purpose of the act of 1893 was not to prevent the execution of deeds in trust, but to throw such safeguards around them that if any creditor was preferred, then the other creditors might have some data by which to verify or

test the integrity of the preferences; fourth, so, then, Bessent, the assignee, who now has the fund, will pay (1) the Reynolds debt, (2) the sum of $500 on the debt of Sutton & Co., (3) he will, after paying costs and expenses and attorneys' fees, pay the balance *pro rata* among Rose's creditors, allowing Sutton & Co. to participate *pro rata* for that part of their debt in excess of $500. Judgment accordingly. Filed September 19, 1903, at 10:25 o'clock A. M. The plaintiff excepted to his Honor's rulings of law, and assigned errors as follows: "First, for that his Honor erred in that he held the deed of trust from Rose to Bessent is not void except as to the alleged preferred creditor, Grogan. Second, for that his Honor, upon the facts found, failed to hold that the deed of trust to Bessent, trustee, was null and void as to the plaintiffs Sutton & Co. Third, for that his Honor erred in failing to hold that after the payment of the Reynolds debt the plaintiffs were entitled to the whole fund in the hands of Bessent, trustee."

As between the plaintiffs and the creditor, Reynolds, upon the findings of his Honor, there could be no doubt that Reynolds is entitled to his money. The debt was not disputed, and it was secured by a lien upon the same property registered long before the debt of Sutton & Co. had any existence. Reynolds in his answer claimed the property or the proceeds of the sale of the property to the amount of his debt, and even if the deed of trust to Bessent was void, for any reason, yet Bessent had taken the property as trustee and sold it, and had the proceeds of the sale in hand under the control and direction of the Court, and he was bound to return it to its owner, Reynolds. If, however, the debts mentioned in the deed of trust to Bessent are really preferred debts in the sense of the law, then the deed of trust would be void for the reason that Rose, the assignor, failed to file his schedule of those debts as is required by the act of 1893, and the balance

in the hands of Bessent, after paying the Reynolds debt, would belong to the plaintiffs, Sutton & Co., under the deed of trust made by Rose to Kinsey for their benefit.

But we think that the Reynolds and Grogan debts were not preferred debts in the proper sense of the term. The Reynolds debt had a real preference through the deed of trust made by Rose in 1893, because of the fact that it was secured upon the same property embraced in the deed to Bessent and was referred to in the last-mentioned deed as being secured on the same property. If it had not been secured on the same property, then it would have stood on an equal footing with other unsecured creditors of Rose, and it would have been necessary to have scheduled it under the statute. His Honor's finding of fact in reference to the Grogan debt carried with it a conclusion of the law that it was void for want of consideration and was invalid. The Bessent deed was in operation as to that claim, but, the others being valid, the deed is sustained as to them. *Morris v. Pearson,* 79 N. C., 253; 28 Am. Rep., 315. Because of the illustration given by his Honor in reference to the debt of Grogan, it is necessary to say that the cases of *Bank v. Gilmer,* 116 N. C., 684, and *Friedenwald v. Sparger,* 128 N. C., 446, have not been overruled by this Court. The illustration given by his Honor was not in consonance with the law.

The judgment is

Affirmed.

WALKER, J., concurring. I concur in the result reached by the Court, but I cannot assent to the statement, which, by the way, is not in my opinion necessary to the decision of the case, that the illustration of the presiding Judge in reference to the debt of Mr. Grogan was not a correct or proper one in law. While it is decided in *Bank v. Gilmer,* 116 N. C., 684, and other cases affirming that decision, that a failure to

file a schedule of the preferred debts will vitiate the assignment under the Act of 1893, ch. 453, in the more recent cases of *Brown v. Nimocks,* 124 N. C., 417, and *Friedenwald v. Sparger,* 128 N. C., 446, and *Hall v. Cottingham,* 124 N. C., 402, it is held that if any one or more of the preferred debts are invalid or insufficiently described in the schedule, the assignment is not void as a whole by reason thereof, but will have effect and be enforced as to those debts which are valid, and which, if preferred, are properly scheduled. The case of *Brannock v. Brannock,* 32 N. C., 428; 51 Am. Dec., 398, and *Morris v. Pearson,* 79 N. C., 253, are cited in support of the principle, and I think they clearly sustain it. The doctrine of these cases is: that there being no good reason why an honest creditor whose claim is valid in every respect should lose or suffer because of the invalidity of some other debt secured by the assignment, one bad debt will not, therefore, be allowed to invalidate the assignment as a security for those debts which are good. If the principle is applied to assignments with preferences, as it is in some of the cases, and is carried to its logical and legitimate consequence, it must be that when all of the preferences are invalid, either inherently or by reason of failure to file a schedule of them, the conveyance is still good as to all the other valid debts, though not preferred. I do not see why it should be good as to some of the preferred debts when others are invalid or schedules of them have not been filed, and not good as to valid debts secured by the assignment when all of the preferred debts are invalid or a schedule of them has not been filed. The same reason which applies to the one must be applicable to the other, and the same rule of law, therefore, should govern in both cases. I doubt very much if it was the intention of the Legislature that the provision of the statute as to filing schedules should be mandatory to the extent of invalidating the assignment if it is not complied with as to

any of the preferred debts. I rather think that the provision was either directory or mandatory only in the sense that a failure to comply with it will not affect the validity of the assignment, but only deprive the preferred creditor who fails to comply with its requirements of any priority in the payment or distribution of the assets of the insolvent under the deed of assignment. There is abundant authority, I think, in support of this view.

This much has been said in order that my concurrence in the opinion of the Court will not be misunderstood as to the matter herein considered, or construed as an assent to the criticism of the Court upon the illustration given by the Judge in his charge to the jury.

CONNOR, J., concurs in the above concurring opinion.

DOUGLAS, J., concurring. If it were an open question I would feel inclined to concur in the opinion of *Justice Walker,* but I found the question settled when I came upon the bench, and yielded my personal views to the authority of adjudicated precedents. At the same time I did not think it necessary to carry it any further. In this spirit I wrote, for a unanimous Court, the opinions in the cases of *Brown v. Nimocks,* 124 N. C., 417, and *Hall v. Cottingham, Ibid.,* 402, by which I must abide.

HARTNESS v. PHARR.

(Filed December 1, 1903.)

DEATH BY WRONGFUL ACT—*Descent and Distribution—Executors and Administrators — Heirs — Domicile — The Code, secs. 1478, 1498, 1500.*

Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile.

ACTION by R. B. Hartness against H. N. Pharr and others, heard by Judge *Walter H. Neal,* at October Term, 1903, of the Superior Court of MECKLENBURG County. From a judgment for the plaintiff the defendants appealed.

Jones & Tillett, for the plaintiff.
W. F. Harding, for the defendants.

WALKER, J. This is an action brought by the plaintiff to recover a sum of money now in the hands of the defendant Pharr as administrator D. W. Hartness. The administrator brought a suit in the Superior Court of Mecklenburg County against the Atlanta & Charlotte Air Line Railway Company and the North Carolina Railroad Company to recover damages for the alleged negligent killing of his intestate, under our statute, The Code, section 1498, and in that suit a verdict and judgment were rendered in his favor for $8,500. The amount of the judgment, with interest thereon, $170, was afterwards paid to him, and there now remains in his hands, after deducting the costs and expenses of administration, the sum of $5,071.25, less the sum of $75 already paid to the plaintiff on his share of the recovery, which bal-

ance will be further reduced by the amount of the costs and expenses of this action to be paid therefrom.

The plaintiff is the father of D. W. Hartness, the intestate of the defendant Pharr, and the defendants, other than the administrator, are the brothers and sisters of the intestate. It further appears that the intestate was killed in this State, and at the time of his death he and his father and his brothers and sisters were all residents of South Carolina and domiciled in that State. The latter were made parties because they claimed an interest in the fund adverse to the plaintiff.

The plaintiff duly qualified as administrator of D. W. Hartness in South Carolina, and afterwards the defendant Pharr qualfied as administrator in this State for the purpose, it is stated in the case, of bringing said suit to recover damages for the negligent killing of his intestate.

The case was heard in the Court below upon the complaint, answers of the defendants and a demurrer to the answers, and the foregoing facts are taken from the pleadings, the allegations of the complaint having been admitted and the demurrer filed to the special matters set up by way of defense. The defendants annexed a copy of the statute of South Carolina concerning the distribution of intestates' estates, which is as follows: "Section 2468. If the intestate shall leave no child or other lineal descendant, but shall leave a widow, and a father or mother, and brothers and sisters or brother or sister, of the whole blood, the estate, real and personal, of such intestate shall be distributed in the following manner, that is to say, the widow shall be entitled to one moiety thereof, and the other moiety shall be equally divided among the father, or if he be dead, the mother and the children of the whole blood, so that such father or mother, as the case may be, and each brother and sister, shall receive an equal share thereof. The children of a deceased brother or sister, of the whole blood, to take among them the share to which

their parents would have been entitled had such parent survived intestate; provided, that there be no representation admitted among collaterals after brother and sister's children. If the intestate shall leave no widow the provision made for her shall go as the rest of the estate is directed to be distributed in the respective clauses in which the widow is provided for."

The plaintiff contends that under the facts of the case the distribution should be made according to the laws of this State, and that, therefore, he is entitled to the whole fund as the sole distributee or next of kin of the intestate.

The defendants on the contrary insist that the fund should be administered or distributed under the laws of South Carolina, and that if this is done the plaintiff will be entitled to one-tenth only, or a child's share, and the balance will go to the defendants who are the brothers and sisters of the intestate. The exact contention of the defendants, as we understand it, is as follows:

1. The defendant Pharr having qualified as administrator in North Carolina subsequent to the appointment and qualification of the plaintiff as administrator in South Carolina, his administration is ancillary to the plaintiff's administration in the latter State, and it is the duty of the defendant Pharr to pay over to the plaintiff, as the original administrator of the deceased, the funds in his hands in order that the original administrator may complete his administration according to the laws of South Carolina, wherein the deceased had his residence at the time of his death. This having been done, the fund once reaching the hands of the South Carolina administrator would be distributed among the next of kin according to the laws of that State, and the rights of the parties would be protected.

2. The other view the defendants present is that if the defendant Pharr, administrator, must distribute the funds

in his hands among the next of kin and thus close his administration, the fund should be distributed as would other personal property in case of intestacy, The Code, sec. 1500, that is, according to the laws of the State wherein the deceased had his residence and domicile at the time of his death.

As between these two opposite claims, we are with the plaintiff, because we believe that upon principle and authority he is entitled to receive the entire fund from the defendant Pharr, subject, of course, to such proper deductions as the law makes in favor of the administrator for costs and expenses, or on account of any payment heretofore made to the plaintiff out of any money in his hands.

It must be admitted that at common law no action would lie to recover damages for the death of a person, though caused by the negligent or other wrongful act of another, and the cause of action upon which a recovery was had in a suit against the railroad companies by Pharr, administrator, was not, therefore, known to the common law, and is solely a creature of statute. The first innovation upon or amendment of the common law, in this respect, was brought about by the enactment of 9 and 10 Vict., ch. 93, commonly called Lord Campbell's Act, because he was its author, and it was mainly through his efforts that it was adopted. It was but one among the many wise and humane reforms of the law attributed to that eminent jurist, who enjoyed the rare distinction and honor of having successively been Chief Justice and Chancellor of England. By that statute it is provided that the action shall be for the benefit of the wife, husband, parent and child of the person whose death is caused by the wrongful act, neglect or default of another, and shall be brought by and in the name of the executor or administrator of the person deceased, and the jury are authorized to give such damages as they may think proportioned to the

injury resulting from the death to the parties respectively, for whom and for whose benefit such action shall be brought, the amount to be divided among the parties in such shares, as the jury by their verdict shall find and direct; and by amendment (27 and 28 Vict., ch. 95) it was provided that if the personal representative did not bring the action within six months after the death occurred, the parties for whose benefit the action was given might themselves bring the same.

The provisions of that act in their essential features have become part of the statute law of nearly all, if not all, of the States, the principal difference between Lord Campbell's Act and the statutes of this country consisting in the method of bringing the action, the designation of the beneficiaries and of the person or persons in whose name the action shall be brought.

It must be borne in mind that whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through or under him, and this is so although the personal representative may be designated as the person to bring the action. *Baker v. Railroad,* 91 N. C., 308. The latter does not derive any right, title or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative, he may perhaps be liable on his bond for its proper administration. *Baker v. Railroad, supra.*

In further elucidation of the question involved in this case, it is well to consider that the cause of action given by the statute is not only one which originates at the death of the

intestate and is by no means a part of the assets of his estate, but that it exists in this particular case only by virtue of a statute of this State, and it arose in this State, as the death occurred here. The Legislature, having created the right to sue for damages in such a case, had the power to annex to it any condition or impose any restriction upon it, including the power to declare how and in what manner the right should be enjoyed. Indeed, the mode of distribution is made an integral part of the cause of action, and cannot, in the nature of the case, be separated from it. This view has been taken by this Court when construing another provision of the statute in regard to the time, one year after the death, within which the action must be brought. In *Taylor v. Iron Co.,* 94 N. C., 526, referring to that provision limiting the time for suing, the Court says: "The State gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it." In *Best v. Kinston,* 106 N. C., 206, it is said that the action could not be brought at common law and is only entertained by the Courts under the provisions of The Code, which embraces the principal features of the English statute, and that the right of action does not vest until the death, which is itself the cause of action.

The Legislature had the power to prescribe the conditions upon which the right should exist, and it must be equally true that it had the power to declare how and in what way the right should be enjoyed, and this it did by section 1500, by which it is provided that "the amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in the case of intestacy." The direction in that section is explicit that the

amount of the recovery shall be disposed of as provided in chapter 33 for the distribution of personal property of intestates, and this provision is made in section 1478 of The Code, which gives the fund to the father, under the facts of this case, he being the next of kin of the intestate. The Legislature might have said, perhaps, that it should go in the way provided by the statute of the State of South Carolina or the place of the intestate's residence and domicile. It did not so declare, but, naturally and reasonably enough, provided that its own laws should govern in the distribution of the money, the suit not being one brought under the statute of South Carolina, but under the statute of this State, the cause of action having arisen here.

The views that we have expressed and the conclusion reached, that the fund must be paid out by the administrator according to our statute, is sustained by the highest authority. One of the leading cases upon the subject is *Dennick v. Railroad*, 103 U. S., 11, in which case it appeared that the death was caused in New Jersey by the negligence of the defendant, who was sued in New York, by an administrator appointed there, for the damages sustained, and it was held that the fund recovered in the action should be distributed in accordance with the statute of New Jersey, under which the action was brought, the cause of action having arisen in that State. The case of *McDonald v. McDonald* (Ky.), 28 S. W., 482, 49 Am. St. Rep., 289, was like the case at bar in all its essential facts, the only difference between the two cases being that in that case the death occurred in Illinois and the action was brought in Kentucky, and that difference, it must be admitted, strengthens it as an authority in this case, where the death occurred and the cause of action arose and the suit was brought in the same State. It was held in that case that, though the suit could be brought and the recovery had by an administrator appointed in Kentucky, the amount recovered

should be paid to the persons entitled to receive the same under the statute of Illinois.

It is our opinion, therefore, and we so decide, as it is clearly established both by reason and authority, that the fund received in such actions must be distributed to the persons who are designated as the beneficiaries thereof by the statute of the place where the cause of action arose, and this is so even if the cause of action arose in one State and the suit is brought in another, for in such case the recovery must always be to the same uses as would be a recovery in a suit brought in the State where the cause of action originated. *Nelson v. Railroad,* 88 Va., 971; 15 L. R. A., 583; *Morris v. Railroad,* 65 Iowa, 727; 54 Am. Rep., 39; *In re Deganore,* 86 Hun., 390; *Stoeckman v. Railroad,* 15 Mo. App., 503; *Fable v. Railroad,* 65 N. E. Rep. (Ind.), 929; *Railroad v. Sullivan,* 120 Fed. Rep., 799; 61 L. R. A., 410.

The administration of the defendant Pharr is not ancillary to that of the administration in South Carolina, so far as the fund now in his hands which was recovered from the railroad companies is concerned. In no possible view, as we have said, can this fund be regarded as a part of the assets of the estate of the deceased. The cause of action never accrued to him and never came into existence until his death, and the recovery thereon cannot be considered or treated as any part of his estate. The doctrine that the succession to personal property is determined by the law of the intestate's domicile, as laid down in *Leak v. Gilchrist,* 13 N. C., 75, which was cited in the brief of the defendant's counsel in support of his position, has no application to this case. The personal representative in South Carolina in right of the next of kin succeeded to no property, because his intestate died leaving none, unless he had effects other than the money now claimed as a part of his estate. To require the defend-

ant Pharr to pay the money to the South Carolina administrator would be in direct contravention of our statute.

The fund, subject to the deductions already mentioned, must be paid to the plaintiff, who is entitled to receive it as the sole next of kin of the intestate, to the exclusion of the defendants. There was no error in the ruling of the Court below.

Judgment affirmed.

BIVINGS v. GOSNELL.

(Filed December 8, 1903.)

1. DEEDS—*Recordation.*

Where a deed is recorded in the county where the land is situated, and the county is afterwards divided, it is not necessary to register the deed in the new county, though the land lies therein.

2. EJECTMENT—*Title—Evidence—Possession—Acts 1897, ch. 109.*

The evidence in this case to recover land is sufficient to warrant the denial of a motion to dismiss.

ACTION by Mary M. Bivings and others against William Gosnell and others, heard by Judge *E. B. Jones* and a jury, at March Term, 1903, of the Superior Court of POLK County. From a judgment for the defendant the plaintiff appealed.

Solomon Gallert, for the plaintiff.

No counsel for the defendant.

CONNOR, J. This was an action brought for the recovery of a tract of land fully described in the complaint. The plaintiffs allege title in themselves, possession of a part of the property by the defendants, and the wrongful withholding. The defendants deny each allegation of the complaint, thus

imposing upon the plaintiffs the duty of proving title, possession and the unlawful withholding. For that purpose the plaintiffs introduced a grant from the State to William Garrett, dated September 12, 1831, and registered in Polk county; a deed from William Garrett to James Morris, dated December 7, 1833; a deed from Garrett to Morris, April 14, 1834, registered in Rutherford County; the will of James Morris, dated February 27, 1855, probated in Rutherford County. The defendants objected to the introduction of the two deeds and the will, for that they were not properly probated and recorded in Polk County. The objection was overruled and the defendants excepted. The plaintiffs introduced S. B. Edwards, who testified that he was a surveyor and surveyed the lands in controversy. Upon being shown the plat he testified that it covered the land in controversy; that certain lines pointed out on the plat covered the land claimed by and in possession of the defendants. The plaintiffs then introduced James Pritchett, who testified that he was sixty-nine years old and lived adjoining the Morris land for thirty years; that he had cultivated a part of it—about two acres—and he and his son had been in possession for thirty or thirty-five years; that he paid rent as taxes on all of the land; that he went into possession under Morris. S. K. Cantrell testified that he was sixty-five years old and knew the land in controversy, and had rented the Morris land twenty-three years ago; that Morris rented to one Johnson when he first knew him; that he was in possession on both sides of the road. Eli Shehan testified that he knew the land, and his father lived on it in 1859; that he lived on the right hand side of the road; north of the road he rented from James Morris, and his father cultivated part of both tracts of land; that he moved away before Pritchett moved there; that Morris came there and showed him where the line was when he cleared the land. N. B. Hampton testified that he was sixty-nine

years old and remembered when Polk County was organized; that the land in litigation was located in Rutherford County before Polk County was organized. N. H. Hill testified that he was eighty-three years old, and knew the Morris land in litigation; that it was located in Rutherford County before Polk County was organized. J. S. Pritchett testified that he knew the land in dispute; that he was in possession under Morris; that eight or ten years ago he turned it over to the witness and his father, and he cultivated about four acres on both sides of the road; that the road pretty well divided the cultivated land; that he cultivated a corn patch near the big swamp, between the swamp and the road, about three years ago.

The plaintiffs then proved that Mary Bivings and Martha Rawley, plaintiffs, were daughters of James Morris, Sr., and that James Morris, Sr., died before the war. It was in evidence that Polk County was formed in 1855. The will of James Morris directed the Garrett land to be sold and the money divided between his wife and daughters.

The defendant introduced no testimony and moved to dismiss the action under the Act of 1897, ch. 310. The motion was allowed and plaintiffs appealed.

The ground of the objection to the introduction of the deeds is not pointed out in the objection. We assume that it was because they were not recorded in Polk County. It appears that they were recorded in Rutherford County, and that when so recorded the land was situate in that county, the county of Polk having been established in March, 1855, comprising that portion of Rutherford in which the land is located. We are not advised of any statute or rule of law requiring the registration of deeds, in such cases, in the new county. In Devlin on Deeds, sec. 669, it is said: "We are not apprised of any statute which would require an owner of land, having his deed properly registered in the county where

the land lies, to have his conveyance again recorded as often as by subdivision and changes the land may fall into a new or different county. Very prudent men may use such precautions. But it is not necessary for the protection of their rights, the first registry being amply sufficient." The deeds being properly recorded in Rutherford County were admissible.

The deeds being competent, the question is presented whether there was any evidence tending to show possession by the plaintiffs or those under whom they claim. His Honor being of the opinion that there was no such evidence dismissed the plaintiffs' action. We think in that respect he was in error. The boundaries of the land are clearly and fully set out in the deeds. There was testimony tending to show possession by Morris and his devisees sufficient to have been submitted to the jury. J. S. Pritchett says: "I know the Morris land—the land in dispute—I have been in possession of the land under Morris; eight or ten years ago he turned it over to me from my father; my brother-in-law had possession under me. The field I cultivated was about four acres on both sides of the road; don't know the boundaries of the land; the road pretty well divided the cultivated land. I cultivated a corn patch near the big swamp, between the swamp and the road, about three years ago." S. B. Edwards located the green field on the map. Shehan says that his father lived on the Morris land in 1859; that the surveyor ran around and all about where his father cultivated; that his father rented from James Morris, and that Morris came there and showed him where the line was when he cleared the land. James Pritchett testified that he cleared up some of the land fifteen years ago, and that he and his sons had it for thirty or thirty-five years. J. S. Pritchett, son of James Pritchett, testified that eight or ten years ago his father turned it over to him. It must be conceded that the testimony is very indefinite, but we

think it sufficient to be submitted to the jury on the question of possession, under proper instructions. But if the jury found that the land in controversy was included within the boundaries of the deeds, the legal title, which, under the will of James Morris passed to his heirs, until divested by sale for partition drew the possession to them, and in the absence of any evidence of possession by any one else for a sufficient time to bar their entry, entitled them to recover the land of the defendants.

New trial.

MILLER v. COXE.

(Filed December 8, 1903.)

1. REFERENCES — *Exceptions and Objections—Appeal—Judgments—The Code, sec. 550.*

An appeal from a judgment on the report of a referee overruling exceptions thereto will be treated as an exception to the judgment based upon the conclusion of fact by the referee.

2. LIMITATIONS OF ACTIONS—*Mortgages.*

A second mortgagee cannot have the first mortgage cancelled because it is barred by the statute of limitations.

3. LIMITATIONS OF ACTIONS — *Mortgages — Foreclosure of Mortgages—Power of Sale in Mortgages—The Code, sec. 152, subsec. 3—Acts 1893, ch. 6.*

The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages.

4. LIMITATIONS OF ACTIONS—*Suretyship—Mortgages.*

Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years.

MILLER *v.* COXE.

ACTION by N. W. Miller against Frank Coxe and others, heard by Judge *E. B. Jones,* at March Term, 1903, of the Superior Court of Rutherford County. From a judgment for the plaintiff the defendants appealed.

Solomon Gallert, for the plaintiff.
Justice & Pless, for the defendants.

CONNOR, J. The plaintiff insists that the defendant Coxe has not filed exceptions, assigning error in the judgment of the Court below, as required by section 550 of The Code. Exceptions were filed to the report of the referee, and from his Honor's judgment overruling them the defendant appealed.

It would seem from the remarks of *Smith, C. J.,* in *Bank v. Manufacturing Co.,* 96 N. C., 298, and *Rhyne v. Love,* 98 N. C., 486, that the appellant should have filed exceptions to the action of the Court, pointing out in what respects error was assigned. "It is to be observed that no specific objection is taken to the rulings of the Court, as should have been done, limiting the examination to them, many of which objections to the referee's report, if this had been done, might not have been pressed in this Court, and so relieved it of unnecessary labor. The proper course is to take the exceptions to the ruling of the Court which the appellant wishes to be reviewed, after the rulings have been made, and to let them come up as a part of the record." Treating, however, the appeal as an exception to the judgment based upon the referee's conclusion of fact, as a case agreed or special findings of fact by the Court adopting as its own the findings of the referee, we proceed to dispose of the appeal upon the sole question presented and argued in this Court.

The *feme* defendant, S. C. Miller, as principal, together with her husband, J. A. Miller, as surety, executed to the defendant Coxe, on October 27, 1880, her bond under seal,

promising to pay, November 1, 1881, the sum of $500. On the same day they executed to said Coxe, for the purpose of procuring the payment of said note, a mortgage on several tracts of land. It does not appear very clearly from the record whether the first tract named in the mortgage belonged to the defendant J. A. Miller or not, the only language throwing any light upon this question being "where the said J. A. Miller now lives." The undivided interest in the other tracts is described as belonging to both of said parties. The referee finds that a part of the land belonged to J. A. Miller. The mortgage contains the usual power of sale. The only payment upon the bond was made by J. A. Miller, the surety, on March 7, 1896. It does not appear who has been in possession of the land since the execution of the mortgage or the date of the payment. On the 21st June, 1889, the defendant J. A. Miller executed to N. W. Miller his note, under seal, for the sum of $1,018.81, due one day after date, upon which several payments were made, the last being April 24, 1900. To secure said note the defendants J. A. Miller and wife executed to said N. W. Miller a mortgage upon a portion of the land described in the complaint and in the mortgage to Coxe. On September 28, 1898, the defendant Coxe, pursuant to the power of sale contained in his mortgage, advertised for sale the several tracts of land conveyed therein.

This action was brought by N. W. Miller against the defendants Coxe and Miller and wife for the purpose of restraining and enjoining the sale of the land and cancelling the mortgage from Miller to Coxe, alleging that the same was barred by the statute of limitations and was a cloud upon the title of said J. A. Miller and the plaintiff. The defendant Coxe answered the complaint, admitting the material facts, denying that his power of sale was barred by the statute of limitations, and demanded judgment that the Court vacate the restraining order granted and that the action be dismissed.

He asked for no affirmative relief. The defendants Miller and wife answered, admitting the material facts and saying: "These defendants aver and allege that it has been more than three years since the last payment on the Coxe note and mortgage and the bringing of this action, and the same are barred as to the surety J. A. Miller, and the defendant J. A. Miller hereby pleads the statute against said note and mortgage of the defendant Coxe." They further say that: "The allegation in the sixteenth paragraph of the complaint is admitted to be true and is adopted as a plea of the statute of limitations against the defendant Frank Coxe." The cause was referred, and the referee's findings of fact material to the decision of the exceptions argued in this Court are as above set forth.

The referee found as a conclusion of law that the right of the defendant Coxe to execute the power of sale contained in his mortgage was barred by the statute of limitations. His Honor overruled the exception to said finding, and rendered judgment accordingly, from which the defendant Coxe appealed.

The plaintiff insists that a second mortgagee may plead the statute of limitations as against a prior mortgagee, and for that position relies upon the decision of this Court in *Hill v. Hilliard,* 103 N. C., 34. That case came before the Court upon an agreed state of facts in which the simple question submitted was whether a subsequent mortgagee has the right to avail himself of the statute of limitations as a defense to the first mortgage. This proposition was held in the affirmative, and we think correctly so. In this case the first mortgagee, Coxe, has not instituted any action to foreclose his mortgage, nor does he in his answer ask for any affirmative relief. It is difficult to perceive how the subsequent mortgagee can bring the defendant into court for the purpose of having his mortgage cancelled because, as he avers, an action upon it would be barred if the statute was set up in an answer. He

is a proper but not a necessary party to an action brought by the subsequent mortgagee for the foreclosure of his mortgage. This Court held at the last term, in *Menzel v. Hinton,* 132 N. C., 660, that the execution of a power of sale is not within the language of section 152 (3) of The Code, saying: "It is not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power of sale; hence no time is fixed by the statute within which he must execute the power. The word 'action' in the paragraph evidently has reference to the action for foreclosure, and not to the execution of the power of sale, which requires no action." To construe the action otherwise would be to write into it language which we do not find there. See also *Cone v. Hyatt,* 132 N. C., 810, in which *Walker, J.,* says: "The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute it was held that a proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely an action of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court."

We have carefully considered the principle upon which these cases were decided, and see no reason to change the conclusion then reached. This case would come clearly within the principle decided in *Hutaff v. Adrian,* 112 N. C., 259, where it was held that a mortgagor in possession is not entitled to an injunction to restrain a sale upon the suggestion that the execution of the power was barred. This conclusion was in no degree affected by the decision in *Menzel v. Hinton, supra.* The plaintiff, recognizing this difficulty, says that he may maintain this action for the purpose of removing a cloud upon

his title under the act of 1893, chapter 64. Whether this act changes the well-settled rule that the statute of limitations can be used only "as a shield and not as a sword," as a defense and not as a cause of action, is an interesting question which it is not necessary for us to decide in this case, as in no point of view is the plaintiff entitled to the relief asked.

There is, however, another point fatal to the plaintiff's action. It will be observed that the defendant J. A. Miller, as surety for his wife, executed the mortgage on his own land to secure the debt. An action on the note against him *in personam* was barred after three years, but in respect to an action to foreclose the mortgage executed by him it was barred only after ten years. He made a payment on the note March 7, 1896. In this action the creditor, Coxe, asks for no judgment against Miller, either *in personam* or upon his mortgage. What effect the payment of March 7, 1896, would have upon the statutory bar in respect to an action for the foreclosure of a mortgage executed by J. A. Miller presents an interesting question. It is well settled that the three-years bar of the statute available to the surety in an action against him would not affect the right of the mortgagee to an action for the foreclosure of a mortgage if brought within ten years. If the defendant Coxe had instituted an action to foreclose the mortgage executed by Miller it would seem that he could not avail himself of the ten-years bar, because in respect to that cause of action there was a payment within the statutory period. However this may be, as we have seen, the case falls clearly within the principle of *Menzel v. Hinton* and *Cone v. Hyatt, supra,* and we must reverse his Honor's ruling in holding that the defendant's right to execute the power of sale is barred.

It may not be out of place to say, as intimated in *Menzel v. Hinton,* that an amendment of section 152 (3) of The Code by inserting after the words "real property" the words "or the execution of a power of sale in a mortgage on real prop-

erty" would bring the law, in respect to the time within which an action must be brought or the execution of the power be enforced, in harmony.

The judgment of the Court below must be reversed and the cause remanded, that such other and further orders may be made as are in accordance with the rights of the parties.

Error.

OLMSTED v. SMITH.

(Filed December 8, 1903.)

1. NON-SUIT — *Dismissal — Injunction — Quieting Title — Counter-claim—Acts 1893, ch. 6.*

In an action to quiet title to land, an injunction having been issued to prevent the defendant from cutting timber, the plaintiff may take a non-suit, although the defendant claimed damages by reason of the injunction.

2. NON-SUIT—*Counter-claim—The Code, sec. 244, subsec. 2.*

Where a defendant sets up a counter-claim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a non-suit.

ACTION by A. G. Olmsted and others against George Smith and others, heard by Judge *E. B. Jones*, at June Term, 1903, of the Superior Court of BURKE County. From a judgment denying a non-suit the plaintiff appealed.

J. T. Perkins, E. J. Justice and *S. J. Ervin*, for the plaintiffs.

Avery & Avery and *Avery & Ervin*, for the defendants.

MONTGOMERY, J. This action was brought by the plaintiffs to have an adverse claim of the defendants to the land

described in the complaint determined under chapter 6 of the Acts of 1893. The plaintiffs allege that they are in possession of the lands; that the defendants have cut and are cutting large quantities of timber therefrom, and that they are insolvent, and pray judgment that the defendants, their agents, etc., etc., be enjoined and restrained from cutting timber or otherwise trespassing on said land, and that a receiver be appointed to take charge of and sell or preserve the shingle-blocks or timber cut on the lands and hold the proceeds until the final determination of the action. The defendants, in their answer, denied the material allegations of the complaint and prayed judgment "that the restraining order be vacated and that the plaintiffs take nothing by their writ and these defendants go hence without day and recover of the plaintiffs their costs in this behalf expended." At the Fall Term, 1901, of Burke Superior Court the defendants made a motion to have the injunction vacated and set aside, and the motion was granted except as to the land included in the boundaries of the grant to James Greenlee, William and James Erwin.

At the June Term, 1903, of that Court the plaintiffs came into court and asked to take a non-suit. The defendants objected, on the ground that an injunction had been issued against the defendants, and the damages sustained by reason of said injunction should be assessed; and the Court declined to allow the non-suit. The ground assigned by the defendants as a reason why the plaintiffs should not be allowed to be non-suited is not tenable. *Railroad v. Mining Co.,* 117 N. C., 191; *Timber Co. v. Rountree,* 122 N. C., 45. But in the argument here the defendants' counsel took the position that this was a suit of an equitable nature and that the defendants had acquired equitable rights by the judgment of the Court which modified the injunction order. If this case were governed by the old equity practice the position of the defendants would still be untenable, for the defendants have acquired

no rights under the modifications of the injunction order, even if that order be considered a decree. The main cause of action here is to have the title to the land described in the complaint settled, and the injunction was simply an ancillary remedy. In fact, the defendants in their prayer for judgment asked for the very thing that the plaintiff is now seeking to do—to put an end to the action. The defendants set up no affirmative demand in their answer. The cases which they cite in support of their proposition—*Purnell v. Vaughan,* 80 N. C., 46, and *Bynum v. Powe,* 97 N. C., 374—afford no support to it. In the first-mentioned case, after an injunction had been granted, an account was taken and a report made by a commissioner appointed for that purpose, and that report gave the party a right or advantage which he had the right to have tried and settled in the action. "After an order to account and report made, the plaintiff cannot dismiss on payment of costs. 2 Danl. Ch. Pr., 930." The same rule is laid down in *Bynum v. Powe, supra.* In all other cases under the present method of civil procedure there is but one form of action, and the plaintiff may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of non-suit before verdict or final judgment, except when the defendant has a cross-action in the nature of a counter-claim, in which he becomes the actor. *Mfg. Co. v. Buxton,* 105 N. C., 74. And even if the defendant in an action sets up a counter-claim which falls under subdivision 2 of section 244 of The Code—that is, where the counter-claim does not arise out of the same transaction as the plaintiff's cause of action—the plaintiff may submit to a non-suit. *Whedbee v. Leggett,* 92 N. C., 469; *McNeill v. Lawton,* 97 N. C., 16.

Reversed.

WADSWORTH v. CONCORD.

(Filed December 8, 1903.)

MUNICIPAL CORPORATIONS—*Elections—Cities and Towns—Const. N. C., Art. 8, sec. 4—Acts (Private) 1903, chs. 85, 86.*

Where a statute provides that an election shall be held to pass upon the question whether a town shall incur the expense of an electric light system, the board of aldermen cannot contract for the establishment of such electric light system without first submitting the question to a vote of the people of the town.

CLARK, C. J., and DOUGLAS, J., concurring in result, hold that a municipal board cannot bind the town by a contract as to necessary expenses to be incurred after their term of office shall expire.

ACTION by J. C. Wadsworth against the city of Concord, heard by Judge *Thomas J. Shaw,* at Chambers, at Shelby, N. C., March 26, 1903. From a judgment for the plaintiff the defendant appealed.

L. T. Hartsell, for the plaintiff.

Montgomery & Crowell, Burwell & Cansler and *W. M. Smith,* for the defendant.

CONNOR, J. The General Assembly of 1903, chapter 85, Private Laws, amended the charter of the town of Concord. By section 5 of said act it is provided: "That the commissioners or board of aldermen of said city shall have the power and it shall be their duty to provide for lighting the streets and public buildings of said city and to contract for and pay for the same." At the same session, Private Laws, chapter 86, we find an act entitled: "An act to authorize the commissioners for the town of Concord to contract for lights for said town." It is provided that whenever twenty citizens

of said town shall apply to the commissioners by a written petition, asking the commissioners to light the streets and public buildings, it shall be the duty of the said commissioners to order an election to be held in said town, at which election those in favor of lights shall vote a ticket on which shall be written or printed the word "Light" and those opposed shall vote a ticket on which shall be written or printed the word "Darkness." If a majority shall vote "Lights," then said commissioners shall have full power and authority to contract for such lights in such quantities and upon such terms as said commissioners may deem for the best interest of said town, for a period not exceeding twenty years, or said commissioners shall have the right to erect or purchase a plant for lighting said town and operate the same. It is further provided that if a majority of said citizens shall vote for lights, the commissioners may levy a tax to pay for the same. No limit is fixed to the rate or amount of such tax, except that it shall be sufficient to pay "regularly and promptly for said lights." These statutes were ratified on the 16th of February, 1903. On November, 1902, the defendant entered into a contract with Thomas A. Scott and his associates for the purpose of lighting the said streets, the terms of which are fully set out in the record, which was to run for the term of eighteen years, and which conferred upon the said Scott and his associates a franchise for twenty-five years for commercial and domestic lighting. No petition was ever filed and no election ever held pursuant to chapter 86 of said acts. We do not deem it necessary to set forth more fully the terms of the contract.

The sixth allegation of the answer, filed the 25th of March, 1903, recites a resolution referring to the Acts of 1903, chapter 85, and reciting: "Whereas, the town of Concord has a population of about ten thousand people, many hundreds of whom work in the mills between sundown and sunrise, and

has about thirty miles of public streets, and a lot of public buildings; and Whereas, it is not only the sense of the board of commissioners for the town of Concord that it is a necessary expense of said town to light the streets and its public buildings, but the Legislature now in session has given the city the power to provide for lighting the streets and public buildings of said city, and to contract for and pay for same; now, Whereas, the contract heretofore entered into with Thomas A. Scott and Reuben Burton is fair, just and equitable, and to the best interest of said town; Therefore, be it resolved by the commissioners of the town of Concord that said contract with Thomas A. Scott and Reuben Burton be and the same is hereby in all respects confirmed."

In view of the answer and the legislation in respect to the town of Concord prior to February 16, 1903, it would seem that whatever validity this contract has is by virtue of the two acts hereinbefore referred to. This is evidently the view of the defendant. Certainly if the contract was incomplete prior to February 16, 1903, the attempt to confirm it without complying with chapter 86, Laws of 1903, could have no other or further effect than if it had been originally made at that time. No explanation is given in the answer why this contract was not submitted to a vote of the people pursuant to chapter 86 of the Laws of 1903. As we have seen, the act authorized and directed this course to be pursued upon the petition of twenty citizens, and it would have required but a short time to have submitted it to the voters and thereby removed all questions in regard to its validity.

This action is brought by the plaintiff, a citizen and taxpayer, for the purpose of enjoining the town from entering into said contract. A number of interesting questions were discussed before us upon the argument and in the briefs, respecting the right of a town to enter into a contract of this character for the purpose of furnishing lights as a "necessary

expense." Whatever views we may entertain upon that question, we are of the opinion that the power of the commissioners to enter into a contract for lighting the said streets is prescribed by and restricted to the provisions of chapter 86, Private Laws of 1903. The two statutes should be read together, and thus read they make it the duty of the commissioners and empower them to provide for lighting the streets and to contract and pay for the same when empowered so to do in the manner pointed out in the statute. It may be that by a proper construction of the charter the power is conferred to provide lights and pay for the same out of the ordinary revenues of the town, but if the citizens wish a more extended or permanent system for lighting the town, requiring the levy of a special tax, they may confer upon the commissioners the power to make the contract not exceeding twenty years. It would seem clear that it was the purpose of the Legislature to restrict the power to make such contract by the terms of chapter 86, otherwise this act, which was evidently passed as a companion to the act amending the charter, chapter 85, would be of no effect. "Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued or the contract will not bind the corporation." Dillon Mun. Corp., sec. 449.

In *Zottman v. San Francisco,* 20 Cal., 102, 81 Am. Dec., 96, *Field, C. J.*, says: "The mode in such cases constitutes the power. * * * Aside from the mode designated there is want of all power."

The Court, in *Des Moines v. Gilchrist*, 67 Iowa, 210, says: "It is a general principle of the law that the specific designation of the manner of exercising a power operates as a limitation upon the general power conferred." The Code of Iowa

conferred upon cities the general power to make regulations against danger from accident by fire, and to establish "fire districts," and on petition of the owners of two-thirds of the grounds included in any square to prohibit the construction of wooden buildings, etc. It was held that an ordinance prohibiting wooden buildings within such squares passed without the petition of the requisite number of property owners was void.

"Where a thing is directed to be done through certain means or in a particular manner, there is implied an inhibition upon doing it through any other means or in a different manner." *Keckuk v. Scroggs,* 39 Iowa, 447.

A statute authorized the council of Pittsburg to grade, on the application of a majority of the lot-holders of the street, and to assess the cost, etc. It was held by the Supreme Court of Pennsylvania, *Sharswood, J.*, that "Without such application the city had no power or jurisdiction in the premises." *Pittsburg v. Waters,* 69 Pa. St., 365.

In *Swift v. Williamsburg,* 24 Barbour, 427, the plaintiff having performed services for the city upon a contract made in the absence of a compliance with the statute requiring a petition by the requisite number of citizens, the Court says: "If plaintiff can recover on the state of facts he has stated in his complaint, the restrictions and limitations which the Legislature sought to impose upon the powers of the common council go for nothing. And yet these provisions are matters of substance, and were designed to be of some service to the constituents of the common council."

"It is an elementary principle of construction that charters of corporations conferring powers are to be construed strictly." Cooley Const. Lim., 232.

It does not appear why, with this act in full force and effect, the commissioners entered into the contract in controversy without consulting or having the approval of the citizens

of the town. With this, of course, we have nothing to do. It is ours to construe and declare the law. The passage of chapter 86 is strictly within the power and duty of the Legislature, as prescribed by Article 8, section 4 of the Constitution: "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations."

Whether providing lights for the city is a necessary expense is an interesting question. It has been discussed and considered by this Court in *Thrift v. Elizabeth City,* 122 N. C., 31, 44 L. R. A., 427. We are of the opinion that when it is made the duty of the commissioners to provide lights it is at least a legislative construction of the Constitution that it is a necessary expense. To what extent they may incur debts or make contracts for a long term is a delicate and important question not necessary to be decided in this case. It is within the province of the Legislature to prescribe the terms and conditions upon which municipal corporations may enter into such contracts. It is held by many respectable Courts that the power to make such contracts is unlimited as to time. There are authorities to the contrary. The question is of much importance to the citizens of this State, and deserves the careful consideration of the legislative department of the government.

We think that for the reasons hereinbefore set out the judgment of his Honor should be

Affirmed.

CLARK, C. J., concurring in result. The mayor and commissioners of the town of Concord, in November, 1902, entered into a contract with Scott & Burton for lighting the

public buildings and streets of said town with electricity for the term of eighteen years from 1st June, 1903. The town has been lighted by electricity for the last thirteen years, the current contract not expiring till 1st June, 1903. This is an action brought by a citizen and tax payer to restrain the town authorities from paying out any money under said new contract, on the ground that the town had no power to make such contract without having first obtained the consent and approval of a majority of the qualified voters of said town, which had not been done. The Judge, being of opinion with the plaintiff, granted an injunction till the hearing, and the defendant appealed. A tax payer can bring such action. *Flynn v. Electric Co.,* 74 Minn., 180; 2 Dillon Mun. Corp., sec. 914-922; *Crampton v. Zabriskie,* 101 U. S., 601; *Prince v. Crocker,* 166 Mass., 347; 32 L. R. A., 610.

Furnishing light and water for public purposes is in this day and time "a necessary purpose," and has been so recognized. *Gas Co. v. Raleigh,* 75 N. C., 274; *Smith v. Goldsboro,* 121 N. C., 350; Croswell Electricity, sec. 190; *Crawfordsville v. Bradan* (Ind.), 30 Am. Rep., 214, and notes; *Heilbron v. Cuthbert,* 96 Ga., 312; *Ellenwood v. Reidsburg,* 91 Wis., 131; Opinion of Justices, 150 Mass., 592, 6 L. R. A., 842; *Rushville v. Rushville* (Ind.), 6 L. R. A., 315; 16 Am. Rep., 388; *Mauldin v. Greenville,* 33 S. C., 1, 8 L. R. A., 291; *Lott v. Waycross,* 84 Ga., 681; 1 Dillon Mun. Corp. (4 Ed.), sec. 3a, and other cases cited in *Mayo v. Comrs.,* 122 N. C., at p. 25. *Mayo v. Commissioners,* 122 N. C., 5, 40 L. R. A., 163, is only a precedent that the erection by a city of an electric light plant is not a public necessity, but that point is not presented in this case, and it is not necessary that we should pass upon it. *Egerton v. Water Co.,* 126 N. C., 93, 48 L. R. A., 44, is the only case in which it has been held (and there by a divided Court) that furnishing a town or city with a supply of water is not a necessary expense,

and upon fuller consideration we must overrule it. All the towns in the State, of sufficient size, have, notwithstanding that decision, continuously down to the present continued to furnish light and water for public purposes, and the validity of such contracts, even to the extent of conferring a right of action for breach thereof upon beneficiaries though not parties to the contract, was upheld in *Gorrell v. Water Co.*, 124 N. C., 328, 70 Am. St. Rep., 598, 46 L. R. A., 513. In that case there was an act of the Legislature authorizing the contract, but it does not appear that the matter was submitted to a vote of the people, which would have been indispensable if furnishing water had not been "a necessary expense." Const., Art. VII, sec. 7. Furnishing light and water, for public purposes at least, being a necessary expense, the only question remaining is: for what period are the municipal authorities authorized to so contract? Can they contract for any period, however long? Can they contract for one hundred years, or eighteen years (as here), or for ten years, and thus tie the town down for long years to a system which in the rapid march of improvement may become antiquated, or be superseded by the invention of a far better or a far cheaper system, or which may become unfitted to the proportions which a growing town may soon attain? The Courts in the later cases, oppressed with the force of this objection, have laid down the principle that the length of time must be "reasonable." This is objectionable unless there is a rule to determine what is reasonable; otherwise, it will leave the decision of reasonable time in each instance to the views of the particular Judge or Court which tries the case, the rule of "the Chancellor's thumb." Besides, if the town authorities have power to make the contract at all, they and not the Court are to judge of the extent of the exercise of power confided to them (*Broadnax v. Groom*, 64 N. C., 644) in the

absence always, of course, of fraud, which is not charged here.

Yet there must be some restriction *ex necessitate* in the duration of such contracts. Certainly the most logical one is this: that inasmuch as the town authorities are elected for a specified fixed term to furnish, among their other duties, those things which are necessary expenses for the town, that the authority of the commissioners to contract for such necessities is restricted to the time for which they have been chosen by the people to discharge that duty, *i. e.*, for their term of office, and they cannot make a valid contract for such purpose beyond the term for which they have been authorized to act in supplying such necessary things. Certainly this is a safe rule, free from the fluctuations and arbitrariness incident to the doctrine of "reasonable duration" (unless the term of office is reasonable time), and this Court is as fully empowered to establish this rule by way of precedent as the Courts which have created the rule which subjects the length of every contract to be "validated" by a law-suit. Under that system no contract is certainly valid unless passed upon by litigation instituted for that purpose.

It is true it is argued in this case that no contractor will go to the expense of establishing a light plant for a short-term contract. This is merely the argument *ab inconvenienti* and would make it a matter of consideration not between the town authorities (elected by the people thereof) and the contractor but between a court (not acquainted with the needs of the town and attendant circumstances) and the contractor, how short a term the latter can be induced to take. Furthermore, if the contractor is not willing to take a contract for two years (the term of office), with the opportunity to furnish private consumers, and trust to the reasonableness of his prices and the advantages of already having a plant to procure a renewal from the board successively elected each two

years, then it is open to the town either to establish its own light and water plant, as most progressive towns are doing, or the desired contract can be submitted to the qualified voters upon legislative authority, to make a contract for such period as the popular voice may ratify at the ballot box. It is always a sound policy to consult the will of the taxpayers upon an expenditure of this importance, especially when the engagement is to extend some years into the future.

"It may now be taken as well settled by this Court that water and light are not in themselves such necessary expenses of the town as to authorize an *unusual* levy of tax or the *incurring of a debt* without proper legislative authority and the approval of a popular vote." *Thrift v. Elizabeth City,* 122 N. C., 31. That authority is exactly in point, and we have none to the contrary. In that case a contract to supply the town with water for thirty years was held invalid, the Court saying, through *Douglas, J.,* that "there is no difference between making a contract binding a municipality for a long period of years, requiring the payment of a large yearly sum, and the issuance of bonds of the municipality to run a like period."

The view herein expressed, that furnishing water and light for public purposes is a necessary expense, but restricting the power of the town commissioners to contract to the term of their office (in the absence of special authorization by a vote of the people to contract for a longer period), reconciles and puts in perfect accord the proposition laid down in *Thrift v. Elizabeth City, supra,* with the ruling of the Court, stated by the same learned Judge, in *Smith v. Goldsboro,* 121 N. C., at p. 352, as follows: "The city provides for its citizens electric lights and water, as it is its duty to do; * * * the defendant has taken possession of said street in order that it may perform its duty to its citizens and furnish water and lights to the owners of said lots." It is not the *duty*

of the town commissioners to furnish water and lights longer than the period for which they have been elected to do that duty. And in the absence of a special authorization by popular vote they have no power to go beyond their term of office and, by a contract extending beyond their term, provide for future years and thus tie the hands of their successors, who may be able by their better judgment or by reason of the progress of invention to furnish the public with necessaries by a better or more economical method.

In this state of the law, those desiring profitable contracts will not be tempted (as in some cities) to spend money to elect a temporary board to make contracts, pillaging the tax payers for a long period of years. They can only get long contracts from the people at the ballot box with full discussion and publicity. Already, in these last few months, a well-known discovery promises with good reason to reduce electric lighting to one-eighth of its present cost. If it were a question, therefore, for the Courts to pass upon the "reasonableness" of time and prices of a contract by a municipality, could this contract for eighteen years and $85 per year for 1,200-candle-power light be held reasonable?

We come to the same conclusion as his Honor, though for a somewhat different reason, that the contract to furnish the town with electric lights for eighteen years is invalid. Section 5, chapter 85, Private Laws 1903, authorizing the town commissioners of Concord "to provide for lighting the streets and public buildings of the city and to contract and pay for the same" does not affect what is said above, for such power was already in them, but not to be exercised beyond their term of office unless submitted to a vote of the people, since it cannot be "a necessary expense" to bind the town now to the rates and terms of the proposed contract "for a long period of years." *Thrift v. Elizabeth City, supra.* Indeed, the act of 1903 does not contain any words attempting to

confer upon the commissioners such authority. It merely gives them the ordinary right to provide for lights, which, as we have seen, means the *right* to contract for lighting for such period as it is their *duty* to furnish lights. But whether this act may not authorize the establishment of a municipal plant, as a *present* "necessary expense" (and not a continuing expense), like the power to build a town jail or guard house, *McLin v. Newbern,* 70 N. C., 12, or to erect a city hospital, *Smith v. Newbern,* 70 N. C., 14, 16 Am. Rep., 766, or like a county building a court-house, *Vaughn v. Commrs.,* 117 N. C., 429, and as is held as to an electric light plant in *Light Co. v. Jacksonville* (Fla.), 51 Am. St. Rep., 24, 30 L. R. A., 540, and in *Mitchell v. Negaunee* (Mich.), 38 L. R. A., 157, 67 Am. St. Rep., 468, is, as already stated, a matter which is not before us.

The views above expressed will not invalidate any contract for necessary expenditures during the term of office of any board of commissioners who have made such contract, nor during the term of any board which has ratified or recognized and acted upon such contract, but at the end of the current term of such board the contract will not be binding on their successors unless ratified or recognized by them, except, of course, in those cases in which a contract for a longer term has been authorized by popular vote.

Where a contract for lighting, water and the like is to be be made, it is for the public protection that it shall not be binding for a longer time than the duration of powers of the temporary agents, the town commissioners. To be binding beyond that term, the people can and should be consulted at the ballot box, as in the recent struggle for good government in Chicago over the granting of franchises for street cars. The assumption of authority by the board of aldermen to contract, without a vote of the people, beyond their term has elsewhere led to untold corruption, and we

should be warned against opening the door here by precedent, though there is no intimation of fraud in this case. All the Courts now hold that the power of the town authorities to contract must be restricted to "a reasonable time." Instead of a contest in the Courts in each case, as to what is a reasonable time, to the detriment of contractors as well as the town, a reasonable time is the term of office of the town authorities, since within that time if a longer contract is desirable the matter can be submitted to the people at the ballot box. They, and not the Courts, are the tribunal to determine what is such reasonable time for which they are to be bound.

When, however, a contract has already been made beyond such "reasonable time" the contract is not void but voidable. The Courts have held in such cases that for the time the contract has been *executed* the town must pay for what it has received thereunder. *Carlyle Water Co. v. Carlyle,* 31 Ill. App., 325; *E. St. Louis v. Gas Light Co.,* 98 Ill., 415, 38 Am. Rep., 97. As to the *executory* part, the authorities then in office can ratify it for their term, but as to the part beyond their term, the people not having elected the commissioners to represent them beyond such term of office, such contract can only be made subject to approval at the ballot box. One Legislature cannot bind a succeeding one by a legislative contract enforcible at law; nor can one board of town representatives bind its successors. I Dill. Mun. Corp. (4 Ed.), sec. 97. There were authorities, before the abuses of contracting by town authorities were so well known or had become so unpleasantly notorious, that they could make contracts extending beyond their terms of office—"the evil that men do live after them." The more recent authorities are that such contracts are only valid if of "reasonable duration," though of course compensation even in such case is recoverable for the *executed* part of the contract.

The better reason, and the evident intent of constitutional provisions in several recent Constitutions, is that such "reasonable time" is the term of office of the officials acting on the contract, and if a longer time is desirable the matter should be referred to popular vote, as can be so readily done. Our towns and cities should have this protection, especially in view of the present and prospective growth of municipal indebtedness, which bids fair to outstrip even their growth in population. This view conflicts with none of our precedents, will safeguard our towns and cities from improper debts, often fraudulently made according to experience elsewhere, and will in no wise hamper municipal administration, seeing that ordinary supplies and requirements need not be contracted for longer than two years, the term of office.

Of course the General Assembly can, by general statute applicable to all municipal corporations, or by special statutes applicable only to the town or towns named, authorize the boards of town commissioners to contract for a specified length of time, beyond their terms of office, and they will be then elected by their respective constituency with knowledge on the part of the electorate that such officials can bind the municipality for such length of time for necessaries to be furnished even after they shall go out of office. But as the law now stands there is no such statute and the power of the municipal boards to bind the municipality by their contracts expires with their power of attorney, their term of office, leaving the town to be bound thereafter only by the ratification, express or implied, of such contract by the newly-elected board. If this were not so, it would follow that a town board could bind the town for contracts, far into the future, to furnish water, lights and other necessaries, at high figures, perhaps, while under *Mayo v. Commissioners,* 122 N. C., 5, they are disabled to contract for a water or light plant for which the municipality would receive at once prop-

erty in hand in return for its cash or bonds. Such practical result would afford opportunity to prevent for a long time the acquisition of water and light plants by any town boards forestalling public opinion where it might be in favor of municipal ownership, and would offer opportunity for palpable abuses. I do not think such is now the law, but that in the absence of a statute giving them such power the town boards of commissioners cannot bind the municipalities beyond the terms for which they are elected and empowered to act as municipal agents.

In the present case the judgment should, in any view, be modified, so as to dissolve the injunction during the current term of the commissioners, but for the fact that the contract by its terms was not even to begin till (1st June, 1903) after their term of office ended and has never had any validity. Water and lights are necessary expenses during the term of the town commissioners or aldermen whose *duty* it is to furnish them, but they are not necessary expenses which such authorities must or can incur for their successors in office, unless authorized thereto by a vote of the people.

DOUGLAS, J., concurring. I fully agree with the opinion of *Clark, C. J.*, that while water and light are not in themselves such necessary expenses of the town as to authorize an *unusual* levy of tax or the *incurring of a debt* without proper legislative authority and the approval of a popular vote, they are proper subjects of expense to be provided by the municipal authorities out of the current revenues of the town. In fact, I think it is the duty of the board of aldermen to provide them to the fullest practical extent without overstepping the constitutional provision. As this duty is incidental to their tenure of office, it is logically coterminus therewith. In common with all other duties, it begins with their induction into office and ends with the expiration of their term. This seems

to me the only solution of the matter that is capable of practical application. My views are so fully expressed in *Smith v. Goldsboro,* 121 N. C., 350, and *Thrift v. Elizabeth City,* 122 N. C., 31, in both cases speaking for a unanimous Court, that but little remains for me to say. I now realize more fully than ever before the absolute necessity of standing by the doctrines laid down in those opinions, and of throwing around the honest tax payer the fullest protection of the law. Even under the strict construction placed by this Court upon municipal powers, many of our cities and towns, especially those of most rapid growth, are assuming pecuniary burdens that must prove most onerous in less prosperous times. With many of its richest citizens having a legal residence on their farm or some other out-of-the-way place, and its largest corporations operating under foreign charters, the average city tax payer already bears a burden out of proportion of his share of the common benefit. Let us not add to it by letting down the bars that the Constitution has erected for his protection. Let us give at least some voice in incurring the debt to him who will be called upon to pay the debt.

I am aware of the vexed problems that confront us and the difficulty of their solution, but they must be met by giving the fullest protection to the citizen without unnecessarily hampering municipal officers in the legitimate discharge of their duties. In *Thrift v. Elizabeth City, supra,* this Court says, on page 34: "We see no substantial difference between issuing bonds to run for thirty years and the making of a building contract for the same period, requiring the town to pay a large yearly sum which cannot be reduced, but which may be greatly enlarged." In the light of a larger experience and maturer judgment, I think there is a difference, and that decidedly in favor of the bonds. If a city issues its bonds and buys its water-works or light plant, it has something of value that will become more valuable with its increase

in population; while on the other hand, if the city pays rent, its rental will necessarily increase with its increased consumption. The entire trend of modern authority is to restrict all municipal contracts to a *reasonable* duration; and realizing the shifting scale of judicial discretion, I am in favor of some definite rule, not only for our own guidance, but for that of the general public. That which seems most logical in its nature and practical in its application is to restrict such contracts to the official term of those by whom they are made.

BRYAN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed December 8, 1903.)

1. TELEGRAPHS—*Delivery—Free Delivery Limits—Negligence.*

   Where the sendee of a telegram lives outside the free delivery limits it is the duty of the telegraph company to notify the sender and demand payment or guaranty of payment of fees for delivery beyond the limits.

2. TELEGRAPHS—*Notice of Claim—Summons—Damages.*

   A summons served on a telegraph company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time.

3. JURISDICTION—*Contracts—Telegraphs—Damages.*

   The liability for non-delivery of a telegram in another state under a contract made in this state is determined by the law of the latter state.

4. JURISDICTION—*Contracts—Corporations—Foreign Corporations—The Code, sec. 194, subsec. 2.*

   The Code, sec. 194, subsec. 2, authorizes an action against a foreign corporation by a non-resident plaintiff where the cause of action arises in this state.

5. TELEGRAPHS—*Mental Anguish—Damages—Negligence.*

Mental anguish, though unattended with physical injury, is an element of damage in actions against telegraph companies for the non-delivery of messages.

A PETITION TO REHEAR this case, reported in 131 N. C., 828, by *per curiam* judgment.

L. C. Caldwell, for the petitioner.
Jones & Tillett and *F. H. Busbee & Son,* in opposition.

CLARK, C. J. On 9th November, 1900, the following telegram was sent from Mooresville, N. C., addressed to the plaintiff at Wedgefield, S. C., where she resided, in three miles of the defendant's office: "Aunt Anna dead. Funeral Sunday. Answer quick." This message was never delivered, but the contents came to her knowledge the evening of 10th November, too late to take any train in time for the funeral. The "Aunt Anna" named in the message was a sister to the plaintiff. The plaintiff testified that if she had received the message that day or any information as to the death of her sister, she could and would have gone to Mooresville. The son of the plaintiff testified that the operator at Wedgefield knew where the plaintiff was living the day the message was received, and this was not contradicted by any evidence. The sender did not know the plaintiff lived beyond the free delivery limits, and paid all that was asked for sending the message. No special delivery charges were demanded, and the operator at Wedgefield wired back to Mooresville merely: "Party not known." In deference to an intimation from the Court below, the plaintiff took a non-suit, and on appeal at last term that ruling was affirmed by a *per curiam* judgment. On this petition to rehear we are of opinion that the case should have been submitted to a jury. The defendant relies on four grounds:

1. That the sendee lived outside of the free delivery limits. In *Hendricks v. Tel. Co.,* 126 N. C., 310, 78 Am. St. Rep., 658, this Court says: "By its very terms this provision (on the back of telegraph blank) does not apply to the office from which the message is sent. It may be further noted that the company *does not say that the message will not be delivered* beyond such limits, but that a *special charge* will be made to cover the cost of such delivery, which would seem to clearly imply that it would be delivered. No fixed limit of distance or definite sum is specified, and it is difficult to see how the sender can be presumed to know either, in the absence of information from the company." Here the defendant put in evidence its book of rules, which provides (rule 50) that beyond free delivery limits "only the actual cost of the delivery service will be collected; the manager will, however, see that such cost is as reasonable as possible." The company does not restrict its duty to deliver within the prescribed *free delivery* limits (else why the word "free"?). In this case the sendee lived outside of the free delivery limits, it is true, but that fact was not known to the sender, who paid in good faith all that was asked of him for delivery of this message; but it was known to the defendant's operator at Wedgefield, and this is not controverted by the evidence offered for the defendant. The defendant could have sent the message on to the plaintiff, collecting the charges of the special delivery of her, or, if not willing to risk that, it was negligence not to wire back to Mooresville demanding payment or guarantee of the cost of delivery beyond the free delivery limits. It was not only negligence, but bad faith, that knowing where the plaintiff lived (which was not controverted, though the defendant put on evidence, and must be taken as true on this motion to non-suit), the operator at Wedgefield merely wired back the untrue statement: "Party not known." He did not even ask for a better address, and this conduct would

seem to have been caused solely by an unwillingness to be troubled with hiring a special messenger to take the telegram out to the plaintiff's residence. Hence, instead of wiring that the plaintiff lived three miles out and the amount of cost of special delivery and asking its payment or guarantee, he simply wired back that the sendee "was unknown," thus leaving the plaintiff without any knowledge of what was necessary to secure delivery. If the plaintiff had been really unknown, or if a better address had been *bona fide* asked, and the sender had been unable (as it seems) to give further information, a different case would have been presented. If guarantee or payment of special delivery had been asked and refused, there was no compulsion on the defendant to deliver beyond the free delivery limits. But it undertook to deliver this telegram, and instead of demanding the cost of special delivery it misled the sender by falsely asserting, as ground for non-delivery, that the sendee was "not known." A case exactly in point is *Telegraph Co. v. Moore,* 54 Am. St. Rep. (Ind.), 515.

2. The second ground that no special delivery charges were guaranteed is disposed of by what has already been said. The facts of this case differ widely from those in *Hood v. Telegraph Co.,* which affirmed a non-suit by a *per curiam,* 130 N. C., 743, and which was reaffirmed in the same manner, 131 N. C., 828. In that case the sendee lived eight miles from the delivery office, the sender knew that fact and the company did not. The office at the receiving point could not have given the sender any information which he did not already have. It was his own negligence not to have paid the special delivery charges. Here the sender did not know that the plaintiff lived beyond the free delivery limits. The defendant, through its agent at Wedgefield, did, but it did not notify the sender, nor ask pay for special delivery.

It made a false statement that the sendee was unknown and the sender had no way to secure delivery.

3. The third ground that the claim for damages was not presented in sixty days is answered by the fact that the summons was issued and served within sixty days. *Sherrill v. Tel. Co.,* 109 N. C., 527, at page 532, where it is held "the general rule that the commencement of an action is equivalent to a demand applies to cases of this kind. Thompson on Elec., sec. 256." It puts the defendant on notice and comes within the reasoning in that case upon which the rule is sustained, *i. e.,* that it enables "the company to inquire into the nature and circumstances of a mistake in or the delay or nondelivery of the message while the matter is still within the memory of witnesses." The service of the summons puts the defendant on inquiry fully as much as filing the complaint, at possibly a distant court-house, would do. Indeed, Croswell Elec., sec. 557, questions whether this stipulation in the blank is binding upon the sendee at all, but we need not pass upon that point.

The last objection is that the wrong, if any, occurred in South Carolina and is to be tried by the laws of that State, which it is alleged did not at that time allow the recovery of damages for mental anguish. A case exactly in point is *Reed v. Tel. Co.,* 58 Am. St. Rep. (Missouri), 609, 34 L. R. A., 492, which holds that "if a telegraph message is delivered to the company in one State to be by it transmitted to a place in another State, the validity and interpretation of the contract, as well as its liability thereunder, is to be determined by the laws of the former State." The contract was made at Mooresville in this State; it is a North Carolina contract, and damages for its breach are to be assessed according to the liability attaching to such contract under our laws. The Code, sec. 194 (2), authorizes an action against a foreign corporation

"by a plaintiff, not a resident of this State, when the cause of action shall have arisen * * * within this State."

Our authorities have been uniform and unanimous, from the first case (*Young v. Tel. Co.*, 107 N. C., 370, 22 Am. St. Rep., 883, 9 L. R. A., 669) down to the present, that damages are recoverable for mental anguish in cases like the present. In *Sherrill v. Tel. Co.*, 116 N. C., at p. 658, the divided sentiment in the Courts of other States was referred to, with citation of the States on either side, and since then there has been a growth of sentiment elsewhere expressed in many States by statutory enactments in support of the views we have upheld. In South Carolina the North Carolina rule was adopted by statute 20 February, 1901, which is set out in *Meadows v. Tel. Co.*, 132 N. C., at page 44. In Virginia, by chapter 698, Acts 1900, it is enacted: "Grief and mental anguish occasioned to the plaintiff by the aforesaid negligent failures (in 'receiving, copying, transmitting or delivering dispatches, or disclosure of the contents of my private dispatch') may be considered by the jury in the determination of the *quantum* of damages." Statutes of similar purport have been enacted in Arkansas and in other States. In Watson Pers. Inj., sec. 450, he says: "Certainly, on principle, the best considered position is that where mental suffering naturally and proximately results from the default of a telegraph company, whether regarded as a contract or a tort, damages therefor should be recoverable"; and sums up the States holding by judicial determination that doctrine, which were then (1901) already in the majority (see States holding the contrary view, *Ibid.*, sec. 462), irrespective of those which have adopted the majority view by statute like Virginia and South Carolina above quoted, and others. Among those since adhering by judicial decision to the views we have entertained is Louisiana. In *Graham v. Tel. Co.*, 109 La., 1071 (1903), *Nicholls, C. J.*, in a learned opinion, citing numerous authori-

ties, sustains by conclusive reasoning the right to recover for mental anguish in cases like the present. He quotes in the original tongue several paragraphs from The Code Napoleon, showing that damages for mental anguish are not always barred when there is no physical injury, especially Art. 1382, *"Un dommage materiel n'est pas la soule qui donne ouverture a l'action en reparation. Il suffit d'un interest moral"*; and Art. 1133, *"Le prejudice peut etre materiel ou moral. Bien que le prejudice moral ne se compose pas d'elements faciles a resumer au chiffre comme le prejudice materiel il en doit etre tenu compte."*

We have heretofore (107 N. C., at p. 385) quoted that great lawyer, *Cicero* (from his 11th Philippic against Marc Anthony), to show that the same view was held among the bar that gave to the world the great Code of the Civil Law, *"Nam quo major vis est animi, hoc sunt graviora ea quae concipiuntur animo quam illa quae corpore."*

Not to prolong the discussion in such action as this for breach of contract, there is the same reason for recovery of damages without physical injury as in actions for breach of contract of marriage and the like, *i. e.*, that in both cases the parties have notice that mental anguish will be the probable consequences of a breach of contract. If viewed as an action of tort there is the same ground of recovery of damages for mental anguish caused thereby as in actions for seduction and the like; besides, there is the further reason that the telegraph company has violated a public duty which it undertook to discharge in consideration of the grant of its charter. A strong statement of this view may be found 3 Sutherland Damages (4 Ed.), sec. 975; Joyce Elec. Law, sec. 825.

The judgment of non-suit should be set aside, and a new trial is ordered.

Petition allowed.

PHARR v. SOUTHERN RAILWAY CO.

(Filed December 15, 1903.)

1. PLEADINGS—*Admissions—Evidence—Carriers.*

In this action against a railroad company to recover for personal injuries, the answer introduced as evidence does not admit that the decedent could not see the approaching train and was unaware of its approach.

2. NEGLIGENCE — *Contributory Negligence—Evidence—Sufficiency of Evidence—Railroads.*

The evidence in this case is not sufficient to be submitted to the jury as to the negligence of the defendant in killing the decedent, and it shows that the decedent was negligent in failing to look and listen before stepping on the track of the defendant.

ACTION by H. N. Pharr, administrator of G. D. Sinclair, against the Southern Railway Company, heard by Judge *W. H. Neal* and a jury, at July Term, 1903, of the Superior Court of MECKLENBURG County. From a judgment for the defendant the plaintiff appealed.

Clarkson & Duls, for the plaintiff.
George F. Bason and *A. B. Andrews, Jr.,* for the defendant.

MONTGOMERY, J. It has been decided by this Court over and over again that a railroad company, through its locomotive engineer on a moving train during day-time, owes no duty to give signals to a pedestrian on its track who is apparently in possession of his faculties, and in the absence of any reason to suppose that he is not. And the reason is that the engineer may reasonably believe, and act upon the belief, that the walker on the track will get off in time to prevent being stricken. *McAdoo v. Railroad,* 105 N. C., 140; *Meredith v.*

Railroad, 108 N. C., 616; *Norwood v. Railroad,* 111 N. C., 236; *High v Railroad,* 112 N. C., 385; *Neal v. Railroad,* 126 N. C., 634, 49 L. R. A., 684; *Bessent v. Railroad,* 132 N. C., 934. In analogy to the decisions in the above cases the rule has been laid down that where a person is seen by the engineer walking on a foot-path alongside of the track and out of danger, that it may and will be presumed by the engineer that he will remain on the side-path or step farther from the track when he sees the train. *Matthews v. Railroad,* 117 N. C., 640; *Markham v. Railroad,* 119 N. C., 715.

In the case before us the plaintiff's intestate, at the time when he was killed by one of the defendant's engines, was walking, with a bag or sack on his back, between the main track and a side track, the space intervening between the tracks being eight feet. People were accustomed to walk there, and there was room enough for that purpose between trains of cars on both tracks at the same time. As he was passing an engine at rest but exhausting steam on the side track, either to avoid the escaping steam or to cross the track to reach Fifth street, he stepped upon the main track and was immediately stricken by an engine hauling a train of cars on the main track and moving in the same direction that the plaintiff's intestate was going. The evidence of the plaintiff was to the effect that there were no signals of bell or whistle. The plaintiff further introduced the fifth allegation of the complaint and the fifth paragraph of the answer. It was alleged in that part of the complaint that he (plaintiff) had a heavy sack on his back, which bent him over and compelled him to look downward; that opposite to where he was walking on the switch track was an engine blowing off steam, making a great noise and making it impossible almost to see and almost impossible to hear; that on account of the noise of the engine blowing off steam and the cloud of steam in which plaintiff's intestate was enveloped, he was

unaware of the approach of the train and unable to see same on the main-line track; that at all times while the engine on the main line was approaching plaintiff's intestate within a distance of two hundred yards or more the engineer in charge of the defendant's engine, who was defendant's employee, saw or in the exercise of due care could have seen plaintiff's intestate was in a perilous position, and the said engineer in the exercise of due care could have prevented and avoided the killing of plaintiff's intestate."

The defendant, in the fifth paragraph of its answer, denied "that at all times while the engine on the main line was approaching plaintiff's intestate at the distance of two hundred yards or more the engineer in charge of the defendant's engine saw or in the exercise of due care could have seen that plaintiff's intestate was in a perilous position, and that said engineer, by exercise of due care, could have prevented and avoided killing plaintiff's intestate." In the argument here the plaintiff's counsel contended that the defendant, by the wording of the fifth paragraph of his answer, admitted that the plaintiff could not see the engineer on the approaching train or hear the approach of the train because of his position amidst the escaping steam and noise of the engine on the side track, and that the plaintiff was really unaware of the approach of the train and unable to see it. But the allegation of the complaint is not that he could not see or hear, but that owing to the noise and the steam it was made impossible *almost* to see and *almost* impossible to hear. Neither is it alleged in the complaint that before he walked into the escaping steam or before he stepped upon the main track he looked or listened. Nor can it be surmised that the plaintiff intended in his complaint to allege that the plaintiff, before he stepped into the escaping steam or upon the main track, could not see or hear the coming train. The answer in no wise admitted the negligence of the defendant, but

denied it. The plaintiff introduced only one witness as to the killing—W. L. Wentz. That witness testified, in answer to a question put to him by the plaintiff's counsel as to whether the engine on the side track was "making considerable noise," "just ordinary fuss." "He stepped on the end of the cross-ties to shun that engine on the side track—the noise." On cross-examination he was asked: "If there was any steam being made by that engine standing still on the side track, was that in the way of the man?" He said: "I don't know whether there was any smoke at all, but the old man stepped up there, as I understood, to get out of the way of the engine." Question: "That is just supposition on your part?" Answer: "It was making a noise—I am satisfied about that." Q. "Whatever steam or smoke there was, it was south of it?" Ans. "Yes, between him and the depot." The engine that struck the intestate was moving southward and the stationary engine on the side track was heading toward the north. Upon an inquiry by the Court the witness said that at the time the plaintiff stepped upon the main track he was ten or fifteen feet up the road from the stationary engine. The witness further said: "There was nothing to prevent him from seeing the engineer or the engineer from seeing him." Taking the alleged sections of the complaint and answer and the evidence of Wentz, we find not even a scintilla of evidence that the defendant's engineer was negligent. But even if the defendant's engineer had been negligent in not giving a warning whistle or signal, the plaintiff is not entitled to recover, because his own negligence and carelessness were the immediate cause of the injury. In *Matthews v. Railroad, supra*, the Court said: "It is suggested that it is the engineer's duty to sound his whistle and give the plaintiff notice of the approaching train. If we assume that he should have done so when a person was walking ahead on the main track, we see no reason, and presumably he did not, why he should sound

the whistle when the plaintiff was walking on the sidewalk of the track, by which is meant the foot-path at the end of the cross-ties, because he was then out of danger, and the engineer reasonably assumed that he would stay there and step further off from the track when he saw the train. For some singular and peculiar reason the plaintiff moved into a dangerous position at a critical moment, an event which the engineer could not foresee or anticipate. If the defendant was negligent in not giving a signal sound, the act of the plaintiff was much greater carelessness and was the immediate cause of the injury, and he cannot be excused for such disregard of his personal safety." In *Syme v. Railroad,* 113 N. C., 558, the Court said: "We cannot yield to the ingenious suggestion of the able counsel for the plaintiff that the engineer must have seen the long freight train (on the neighboring track of another railroad company) and known the fact that the engine was 'exhausting heavily,' so as to render the intestate so insensible to the approach of the other train as if he had been deaf, and that therefore the defendant's engineer was negligent in not attempting earlier to stop the train. But it was the duty of the intestate to look as well as listen, under the circumstances, and he was negligent if he failed to use his eyes as well as his ears. McAdoo's case, *supra.* On the other hand, the engineer was justified in assuming that the intestate had looked, had notice of his approach, and would clear the track in ample time to save himself from harm." It was alleged in the complaint, and denied in the answer, that the engine was running at a greater rate of speed than that permitted by the city ordinance. There was no evidence offered on that question, and it was admitted on the argument here that such was not the case. If that point had been before us it would not have relieved the plaintiff's negligence, for in *Neal v. Railroad,* 126 N. C., 634, the Court said: "If the plaintiff's intestate was walking upon the defendant's road in

open daylight, on a straight piece of road, where he could have seen the defendant's train for 150 yards, and was run over and injured, he was guilty of negligence. And although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate." To the same effect are *Lea v. Railroad,* 129 N. C., 459, and *Bessent v. Railroad,* 132 N. C., 934. The doctrine of the last clear chance was not involved here, because the intestate was stricken immediately upon stepping upon the track in front of the engine.

We therefore concur with his Honor in the opinion that the plaintiff was not entitled to recover, because there was no evidence fit to be submitted to the jury tending to show negligence on the part of the defendant's engineer, and also because by the undisputed facts, considered in any phase presented by them, the intestate was negligent in failing to look and listen before he left the safe path between the tracks and stepped upon the main track, while the engineer was not negligent in acting on the belief that the intestate would stay where he was.

Affirmed.

WILSON v. MARKLEY.

(Filed December 15, 1903.)

1. STATUTES—*General Assembly—Legislature—Evidence—The Code, secs. 1339, 2689, 2867, 2869.*

A copy of the journal of the legislature deposited with the secretary of state is not evidence for any purpose, and a misnomer of a town in a private act therein does not affect the validity of the act.

2. STATUTES — *General Assembly—Legislature—Journal—Evidence—The Const. N. C., Art. 2, secs. 14, 16, 23.*

The journal of the legislature is competent evidence only for the purpose of ascertaining whether a law had been passed in accordance with the constitution, article 2, section 14, requiring it to be read three times on three different days in each house and the yeas and nays to be entered on the second and third readings.

3. EVIDENCE—*General Assembly—Journals—Parol Evidence.*

The journals of the general assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence.

ACTION by the Town of Wilson against C. Markley, heard by Judge *G. S. Ferguson* at November Term, 1903, of the Superior Court of WILSON County. From a judgment for the plaintiff the defendant appealed.

S. G. Mewborn, for the plaintiff.
F. A. & S. A. Woodard, for the defendant.

CONNOR, J. This is an action submitted to the Court upon pleadings properly filed and a special finding of facts by his Honor, a jury trial having been waived, pursuant to the provisions of section 398 of The Code.

His Honor found the following facts:

1. That on the 5th day of March, 1903, the General Assembly of North Carolina passed and ratified "An act to amend the charter of and to authorize the town of Wilson to issue bonds," same being published in the Private Laws of North Carolina, session 1903, as chapter 291.

2. That section 8 of said act provides: "That the town of Wilson is hereby authorized and empowered to create an additional debt for grading, macadamizing and paving the streets and sidewalks and for extending the sewerage and waterworks systems of said town to an amount not exceeding forty thousand dollars, exclusive of the amounts and sums heretofore authorized to be created by the charter of said town, and for that purpose may issue bonds in the name of the town of Wilson, in such denomination and form and payable at such place and time, but running not less than twenty nor more than fifty years, and bearing interest at no greater rate than five per centum per annum and payable semi-annually, as said board of commissioners may determine."

3. That section 9 of said act provides: "That none of said bonds shall be issued until approved by a majority of the qualified voters of said town at a public election to be held at such time and under such regulations as the board of commissioners may prescribe, at which election those favoring the issue of bonds shall vote 'Issue,' and those opposing shall vote 'No Issue.'"

4. That after due notice an election was held in said town of Wilson on Tuesday, May 5, 1903, upon the question of the said town's issuing said bonds.

5. That at said election there were 440 votes cast for "Issue," and 16 votes were cast for "No Issue"; that the total number of qualified voters of said town of Wilson for said election was 667, and that said election was held and conducted in all respects regularly and in conformity to and with

the laws of the State, according to the provisions and requirements of the charter of the town of Wilson.

6. That thereafter the Board of Commissioners of the town of Wilson instructed and authorized the Mayor, Doane Herring, to offer by advertisement said bonds for sale, pursuant to the provisions of said act.

7. That the defendant C. Markley having made and submitted his bid for $5,000 of said bonds, the said board of commissioners for said town accepted the bid so made and submitted by the defendant for said amount of bonds so bid for by him, and the said town of Wilson, the plaintiff, has had prepared in due form said bonds and has offered and tendered same to the defendant for his acceptance, and has demanded of him the payment therefor according to his said bid, but the defendant refuses to accept said bonds and to pay the plaintiff therefor.

8. That the said bill authorizing the holding of said election and the issuing of said bonds was introduced in the Senate on February 26, 1903, and passed its several readings in accordance with Article II, section 14 of the Constitution, all of which fully and affirmatively appears by the inspection of the Senate Journal. The original House Journal of March 2, 1903, contains the following entry: "S. B. 1063, H. B. 1716, a bill to be entitled an act to amend the charter of and to authorize the town of Wilson to issue bonds. Referred to the Committee on Corporations."

9. That two copies of said Journal were made, one of which was to be filed in the office of the Secretary of State and one to be delivered to the Public Printer; that the copy furnished to the Secretary of State, now on file in his office, is as follows: "Messages from the Senate: 'S. B. 1016, H. B. 1716, a bill to be entitled an act to amend the charter and to authorize the town of *Weldon* to issue bonds.' Referred to Committee on Corporations." That the copy furnished the Public Printer for publication is an exact copy of the original House Journal.

10. That the House Journal of March 4, 1903, contains the following entry: "H. B. 1716, S. B. 1063, being a bill to amend the charter of and to authorize the town of Wilson to issue bonds, passes on its second reading by the following vote: Ayes (giving names of members voting), 91; those voting in the negative, none." Under date of March 5, 1903, said Journal contains the following entry: "H. B. 1716, S. B. 1063, being a bill to amend the charter of and to authorize the town of Wilson to issue bonds, passes on its third reading by the following vote: Ayes (giving names of members voting), 96; those voting in the negative, none."

11. That the endorsements on said bill while in the House of Representatives are as follows:

"Passed first reading and referred to Committee on Corporations, March 2, 1903."

"Reported to the House March 3, 1903, Fav."

"Passed second reading, ayes and noes, March 4, 1903. Cal."

"Passed third reading, ayes and noes, March 5, 1903, and ordered enrolled."

Said bill on its face is numbered "S. B. 1063, H. B. 1716." (Signed) "F. D. Hackett, Principal Clerk."

The Constitution, Art. XI, sec. 16, provides that "Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

Section 24: "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of those houses."

This Court, in *Scarborough v. Robinson,* 81 N. C., 409, held that the signatures of the presiding officers were essential to the validity of an act of the General Assembly, and that

although the Journal showed that a bill had passed both houses and had been enrolled and ratified, whereas in truth it had not received the signatures of the presiding officers, the Court had no power to compel by a writ of *mandamus* the President of the Senate and Speaker of the House to sign the bill.

In *Carr v. Coke,* 116 N. C., 223, 47 Am. St. Rep., 801, 28 L. R. A., 737, it appeared from the complaint, and for the purpose of the motion to dismiss the action it was taken as true, that the bill in controversy was signed by the presiding officers of both houses, duly certified to and received by the Secretary of State, although it appeared from the Journals that it had not passed its several readings. It was stamped by the clerk as having passed in accordance with the Constitution. This Court held that it had no power to "go behind" the signatures of the presiding officers and examine the Journals for the purpose of contradicting the certificate of ratification.

These authorities would seem to establish the law in this State that the Court has no power to examine the Journals and they are not competent to be received in evidence to show the passage of an act or to contradict the certificate of the presiding officers that an act had been duly read three times and passed each house of the General Assembly, excepting acts coming within the provisions of Art. II, sec. 14, thus adopting the doctrine that "the Journal is of good use for the intercourse between the two houses and the like, but when the act is passed the Journal is expired. The Journals of Parliament are not records and cannot weaken or control a statute which is a record and to be tried only by itself." *Rex v. Arundel,* Hobart, 109, 111 Trinity Term, 14 Jac.; *Broadnax v. Groom,* 64 N. C., 244. The law in consonance with this doctrine is strongly and clearly stated by *Chief Justice Beasley* in *Pangborn v. Young,* 32 N. J. L., 29: "When an act has been passed by the Legislature and signed by the Speaker of each House, approved by the Governor, as authen-

ticated by his signature, and filed in the office of the Secretary of State, an exemplification of it under the great seal is conclusive evidence of its *existence and its contents*. It is not competent for the Court to go behind this attestation or to admit evidence to show that the law actually voted on and passed and approved by the Governor was variant from that filed in the office of the Secretary of State. The minutes of the two houses, or either of them, kept under the requirement of the Constitution, will not be received as evidence for such purpose." The able and learned opinion of the Chief Justice is justly referred to by the editor of Greenleaf on Evidence (16th Ed.), sec. 482, as "an arsenal of arguments" on this subject. To those at all familiar with the manner in which the records of the General Assembly are made up the following observations will seem appropriate: "In the present state of the law I am satisfied that an attempt to investigate the manner in which laws have been enacted by our legislative bodies would be attended by far greater evils than those we should be likely to remedy. How shall we proceed and when shall we stop? It is said 'have recourse to the Journals, which certainly are required to be correctly kept and for some purposes evidence.' The answer is: we have painful evidence before us that they are far more likely to be erroneous than the enrolled bills."

In the passage of such bills as the one in controversy, in addition to the provisions of the Constitution noted, they are required by Art. II, sec. 14 of the Constitution to be read three several times in each House of the General Assembly and passed on three several readings, which readings shall be on three different days, and agreed to by each House, respectively, and the yeas and nays on the second and third readings shall be enrolled on the Journal. This Court has held in a number of cases, beginning with *Bank v. Commissioners,* 119 N. C., 214, 34 L. R. A., 487, that this require-

ment is mandatory and its observance essential to the validity of the act. That the purchasers of bonds issued pursuant to such act are fixed with notice of a failure to comply with the constitutional requirement. This principle logically results in the doctrine that the Courts will examine the Journals for the purpose of ascertaining the facts thus held to be essential to its validity. This in nowise conflicts with the general principle, but is an exception to it in so far as it is necessary to ascertain whether the act as ratified has been passed in accordance with the Constitution. It will be observed that his Honor finds from an inspection of the Journal that the act in question was passed in strict accordance with Art. II, sec. 14. It is perfectly clear that the bill which thus passed the House is the *same bill* which in the same manner passed the Senate and was, by message from the Senate, duly transmitted to the House. In the original Journal it is correctly described by number and title, as it is at each stage in its legislative progress through the House. It is the same bill which was enrolled and ratified by the presiding officers, certified to and received by the Secretary of State and by him certified to the Public Printer and published in the "Private Laws of the session of 1903." Chapter 291, page 692. Pursuant to section 2689 of The Code, the Secretary of State certifies: "I, J. Bryan Grimes, Secretary of State, hereby certify that the foregoing (manuscript) are true copies of the original acts on file in this office." This is made competent evidence in the Courts by section 1339 of The Code. Section 2867 of The Code provides that "the principal Clerk of the Senate and House of Representatives, as soon as may be practicable after the close of each session, shall deposit in the office of the Secretary of State the Journals of the General Assembly," etc. Section 2869 requires the Secretary of State, within thirty days after the termination of each session, to cause to be published by the State Printer all the laws

passed at such session, and each volume shall contain his certificate that it was published under his direction from enrolled bills on file in his office. A careful examination fails to disclose any statute making it the duty of the Chief Clerk of the House to make, as an official document, copies of the Journal for the printer and Secretary of State. It is the *Journal,* which we understand to be the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence. It would be a strange result and a serious menace to the integrity of legislative acts if an erroneous copy made by a Clerk in transcribing for any purpose the Journal should be received in evidence to invalidate an act of the General Assembly duly ratified, certified to and published by the Secretary of State. Such a copy as that described in the findings of fact by the Court would not be admissible for any purpose, and if objected to would have been excluded by his Honor. The publication in the Private Laws is evidence of the terms of the act. The Journal is competent only for the purpose of ascertaining whether it had been passed in accordance with Art. II, sec. 14 of the Constitution. We think it proper to say that the testimony of the Chief Clerk was not competent for any purpose. In the view which we take of the law it was harmless. The Journals and other records of the General Assembly must be received, when competent, as they are written and filed with the Secretary of State. It would be a dangerous innovation to permit parol evidence to be heard to explain or alter them. For the purpose for which they are made, as memorials of the proceedings of the General Assembly, they import absolute verity and truth; they must stand as they are made and speak for themselves. As to them, what is written is written, neither to be explained by extrinsic evidence, added to or taken from. The judicial department of

the government dare not permit them to be explained away or changed. We may construe them to ascertain the legislative will as expressed in these memorials, but beyond that border line we may not pass.

Upon the facts found by his Honor we are of the opinion that the act in question is in all respects valid and the bonds issued pursuant to its provisions valid obligations of the town of Wilson.

The judgment is

Affirmed.

DOBSON v. SOUTHERN RAILWAY COMPANY.

(Filed December 15, 1903.)

COSTS—*Case on Appeal—Transcript—Supreme Court—Record—Superior Court—The Code, secs. 968, 540.*

The successful party on appeal from the superior court is entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him.

ACTION by Dobson & Whitley against the Southern Railway Company, heard by Judge *B. F. Long,* at August Term, 1903, of the Superior Court of McDOWELL County. From a judgment for the plaintiff the defendant appealed.

E. J. Justice, for the plaintiff.

S. J. Erwin, for the defendant.

CLARK, C. J. At August Term, 1901, of the Court below and again at February Term, 1903, the plaintiff recovered judgment in this action against the defendant, and on appeal in both instances a new trial was granted. At the third trial below, August Term, 1903, the plaintiff again recovered

judgment. The defendant, however, moved for judgment against the plaintiff for the costs which it had paid the Clerk for preparing and certifying the transcript of the record on each of the above-mentioned appeals. This motion was refused and the defendant appealed.

In *Roberts v. Lewald,* 108 N. C., 405, it is held that "the costs of preparing and transmitting the transcript of a record on appeal to this Court are not costs in this Court, but in the Court below." The Court said: "They accrued anterior to docketing the case in this Court. While no part of the costs of the trial, they are none the less a part of the costs below, and their recovery must be adjudged by appropriate orders of the Judge of that Court." They have never been treated as costs of this Court, nor included in executions issuing for such. The Code, section 968, provides that "the Clerk of the Supreme Court shall issue execution for the costs incurred in that Court." The costs of making transcripts of records on appeal and certificates thereto are not "incurred in the Supreme Court," but in the Superior Court, and are paid to the Clerk of that Court.

The costs in the Superior Court, as a rule, abide the final result in that Court, but there are exceptions, as, for instance, when a continuance is granted upon terms of the payment of the costs of a term or of the costs up to date. These are not recovered back in final judgment, although the party obtaining the continuance may be finally successful in the action; else the terms imposed on him for some default would be illusory. Nor are the costs of an appeal in which a new trial is ordered to be recovered back, because, as in this case, the successful appellant loses in the final judgment. The Superior Court cannot reverse the judgment of the Supreme Court as to the payment of costs of the appeal. *Johnston v. Railroad,* 109 N. C., 504; nor ought a successful appellant

to be made to pay the costs of correcting an error by his appeal because he finally loses on the merits.

While the costs of making the transcript and certificate of record on appeal are not a part of the costs of the Supreme Court, they are a part of the necessary costs of the appeal, and not strictly costs of the Superior Court incident to the trial and procedure in that Court. Hence the successful appellant who has paid them is entitled to recover them from the appellee, and, like costs paid for a continuance (though these last are strictly costs of the trial Court), they are not recoverable back in the final judgment should it go in favor of the opposite party. The Code, section 540, provides that when an appellant is successful in his appeal he shall recover not only the costs in the appellate Court but also "restitution of any costs of the Court appealed from which he shall have paid under the erroneous judgment of such Court." This covers the cost of the transcript and certificate. Whether it does not also cover all the costs incident to the trial at which the erroneous judgment was entered and which was set aside by the appeal is an interesting question not before us.

In refusing the appellant judgment for costs of the transcript and certificate in the appeals in which it has been successful there was

Error.

SMITH v. GUDGER.

(Filed December 15, 1903.)

1. JURISDICTION—*Superior Court—Clerks of Courts—Appeal—Acts 1903, ch. 99.*

The clerk of the superior court has no jurisdiction of an action to sell property for reinvestment, etc., under acts 1903, ch. 99, but when carried to the superior court on appeal it will be retained for a hearing.

2. REMAINDERS — *Estates — Life Estates — Parties — Contingent Remainders—Acts 1903, ch. 99.*

Persons not in being who may have an interest in property invested, in an action for the sale thereof and reinvestment are not necessary parties.

ACTION by E. A. Smith against J. H. Gudger and others, heard by Judge *E. B. Jones,* at November Term, 1903, of the Superior Court of BUNCOMBE County. From a judgment for the plaintiff the defendants appealed.

Whitson & Keith, for the plaintiff.
G. A. Reynolds and *J. H. Merrimon,* for the defendants.

CONNOR, J. The facts set out in the complaint and admitted by the demurrer bring this case clearly within the principle announced by this Court in *Springs v. Scott,* 132 N. C., 548, and *Hodges v. Lipscombe,* at the present term. The allegations in regard to the condition of the property, its non-productive character and the heavy burdens of taxation illustrate very strongly the necessity for the recent legislation and the rulings of this Court in regard thereto. We do not deem it necessary to discuss further the authorities or principles upon which the cases cited as controlling this record are founded. We think, however, that the plaintiff erroneously

brought this proceeding before the Clerk. It is not a special proceeding for partition, but an equitable proceeding for the sale of property and reinvestment of the proceeds formerly cognizable in a court of equity, as set out in *Watson v. Watson,* 56 N. C., 400. We do not think that this equitable power is conferred upon the Clerk. The cause, however, being now in the Superior Court by appeal, as in the case of *Springs v. Scott,* we can see no reason why that Court could not retain control and make all of the necessary orders in the premises. To the suggestion in the demurrer that all the persons who might, in any contingency, have an interest therein are not made parties, it is sufficient to say that the act of 1903 was passed expressly to meet the difficulty therein suggested. Such parties, if any, who shall hereafter come into being who may have any interest in the property are represented by all parties now *in esse.* The question is fully discussed in the opinion in *Springs v. Scott.* We desire to emphasize what we then said with regard to the duty of the Court to be diligent to ascertain the facts in each case and to proceed with caution in making orders therein. By so doing, as we there said, "the purpose of the Legislature will be accomplished without doing violence to, but rather in accordance with, the principles of our jurisprudence, and the preservation and protection of the rights of the parties." We would suggest that before further proceedings are had in this cause testimony be taken and the facts affirmatively found in respect to the allegations in the complaint. The cause should be docketed in the Superior Court and orders and decrees made in accordance with the practice of the Court at regular term thereof and signed by the Judge. Thus modified the judgment of the Court below is

Affirmed.

COWAN v. ROBERTS.

(Filed December 15, 1903.)

PARTNERSHIP—*Dissolution—Notice.*

A notice to an employee or book-keeper in the home office of a seller of goods is not sufficient notice of the retirement of a partner from the partnership, but must be given to the sellers themselves or their credit man.

ACTION by Cowan, McClung & Co. against M. F. Roberts & Co., heard by Judge *W. A. Hoke* and a jury, at May Term, 1903, of the Superior Court of BUNCOMBE County. From a judgment for the defendants the plaintiffs appealed.

Julius C. Martin and *Charles A. Webb,* for the plaintiffs.
W. W. Zachary, for the defendants.

MONTGOMERY, J. This action was brought by the plaintiffs to recover an amount alleged to be due to them for goods and merchandise sold by them to the defendants. The defendant Redmond in his answer denied that he was a partner in the concern of M. F. Roberts & Co. at the time the goods were purchased by Roberts, that firm having been dissolved before that time. On the trial Redmond testified that he told the plaintiffs that the defendants were going out of business and notified them not to sell any more goods after that, and that Redmond Bros. were going out of the firm of M. F. Roberts & Co., but he at the same time explained his statement by saying that he did not know the plaintiffs, and went to the office in Knoxville, Tenn., and "found a man working on the books" and notified him. Upon the evidence his Honor instructed the jury as follows: "If, however, the partnership was dissolved, and the defendant gave notice at the home

office of the plaintiffs to one of the plaintiffs' employees that the firm of Roberts & Co. were going out of business, and that it was the last bill for which the firm of Redmond Bros. & Co. would be responsible, if you find this to be a fact, then the defendant would not be liable for the debt"; and further: "But if the notice was given to Cowan, McClung & Co., or to one of their employees in their office in charge of their books, and their subsequent debts were made without his knowledge or consent, then Redmond would not be responsible, and your answer would be to the first issue 'No.'" These instructions were erroneous.

The notice should have been given to the plaintiffs or to some one of their employees who had charge of their credit department. The "man" the defendant Redmond found "working on the books" may have had no duties connected with any department of the business, except to keep an account of the cash, so far as we know. Of course if any salesman had been notified of the dissolution of the firm, and that salesman had afterwards sold goods to Roberts, Redmond would not have been liable.

New trial.

WILLARD MANUFACTURING COMPANY v. TIERNEY.

(Filed December 15, 1903.)

1. ISSUES—*Attachment—Interpleader.*

In an attachment by a vendee against the vendor of goods, the vendor making no defense, the only issue between the vendee and an interpleader is whether the interpleader is the owner and entitled to the possession of the goods.

2. ATTACHMENT—*Interpleader—Burden of Proof.*

In attachment the burden of showing title to property is on the interpleader.

3. ATTACHMENT — *Presumptions—Interpleader—Negotiable Instruments — Drafts — Bills of Lading — Purchasers for Value Without Notice.*

In attachment, an interpleader having introduced a bill of lading for the property and draft attached properly endorsed, the presumption is that the interpleader is a purchaser for value without notice.

4. ATTACHMENT—*Bills of Lading—Negotiable Instruments—Banks and Banking.*

Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft and he cannot retain the price of the goods on account of a debt due him from the consignor.

ACTION by the Willard Manufacturing Company against G. H. Tierney & Co. and others, in which the Merchants' National Bank of Vicksburg, Miss., intervenes, heard by Judge *W. R. Allen* and a jury, at January Term, 1903, of the Superior Court of DURHAM County.

In August, 1901, the plaintiff bought by sample from defendants 118 bales of cotton, and in September the defendants delivered forty bales thereof and drew a draft on the plaintiff with bill of lading attached for $574.48, which draft the plaintiff paid. The plaintiff alleged that the forty bales did not come up to sample, and claimed damages in the sum of $285.92. The defendants are non-residents, residing in Vicksburg, Mississippi. On September 21st the defendants shipped fifty bales of the lot of 118 bales, drawing draft with bill of lading attached for the contract price, $836.26. The draft was drawn on the Morehead Banking Company, Durham, N. C., "account of Willard Mfg. Co.," "W., fifty bales pickings, bill lading attached," and endorsed to the Merchants National Bank of Vicksburg. The plaintiff refused to pay the draft and attached the cotton as the property

of the defendants Tierney & Co. upon the claim for damages alleged to have been sustained by reason of the failure of the forty bales to come up to sample. The Merchants National Bank intervened, claiming title to the property, and gave the undertaking required by statute. The cotton was thereupon delivered to said bank. The defendants Tierney & Co. filed no answer. His Honor submitted the following issues to the jury:

1. "Was the Merchants National Bank the purchaser for value of the draft for $836.26 and the bill of lading attached thereto covering the shipment of the fifty bales of cotton?" "Answer, No."

2. "Was the Merchants National Bank the purchaser for value of the draft for $574.48 and bill of lading attached thereto covering the shipment of the forty bales of cotton?" "Answer, No."

3. "What was the value of the lot of fifty bales of cotton at the time it was seized in this action?" "Answer $398.85."

4. "What damage, if any, has the plaintiff sustained by reason of the cause of action set out in the complaint?" "Answer, $285.92, interest from September 27, 1901."

5. "Was the cotton attached by the plaintiff the property of the Merchants National Bank at the time of levying the attachment?" "Answer, No."

The interpleader bank objected to the first, second, third and fourth issues; the objection was overruled, and the bank excepted.

The plaintiff introduced A. G. Cox, superintendent of the plaintiff company, who testified to the condition of the forty bales of cotton and the amount of damage sustained thereby.

The interpleader bank introduced the deposition of W. S. Jones, cashier, who testified that the defendants had purchased from Metzger Bros. of Mobile the fifty bales of cotton in controversy, and they drew upon the defendants at

Vicksburg for the price, $697.99; that the interpleader bank advanced or loaned to the defendants the amount of the draft, and they were charged therewith on the books of the bank; that on September 23, 1901, the defendants drew the draft for $836, as aforesaid. "This draft was discounted by the bank, and the proceeds, less discount, were credited to the defendants on the books of the bank on September 28th. The bank discounted or purchased this draft in pursuance of a contract with the defendants that they should deliver to the bank the bill of lading taken out by Metzger Bros. for said cotton, at Birmingham, Ala., by which said cotton was to be delivered to the order of Metzger Bros. by the Southern Railway Company at Willardsville, N. C. This bill of lading had been attached to the draft drawn by Metzger Bros. on the defendants and had been endorsed by them. Upon the payment of the draft the bill of lading had been delivered to the defendants, and in pursuance of said contract it was also endorsed by them and was attached to the draft drawn by them, as above stated. The draft with the bill of lading attached was forwarded to the Morehead Banking Company at Durham, and, upon payment of the same being refused, the draft and bill of lading were returned to the Merchants National Bank, the interpleader.

The amount paid by the bank in the purchase of this draft has never been repaid by the defendants. Metzger Bros., upon being advised that the Willard Manufacturing Company refused to pay the draft and take the cotton, because they alleged that it was defective, agreed that if the cotton was returned to them at Birmingham, free of any charges for freight, they would refund any amount that had been paid to them for the cotton by the defendants.

Thereupon the sale to the defendants, whose right had been acquired by the interpleader bank, was rescinded and the cotton returned to Metzger Bros. at Birmingham, and they

returned to the interpleader bank $697.99, which was the sum that had been paid to them for this cotton by the defendants. The transaction between the bank and the defendants was *bona fide,* by which the bank paid to Tierney & Co. the sum of $830, being the amount of the draft, less discount, upon the delivery to them of the bill of lading, by which the bank became the sole and absolute owner of the draft and bill of lading. The witness was shown the draft for $574.48, dated September 11, 1901, and he stated that the bank had held the same. He also stated that the interpleader bank discounted this draft and placed the proceeds, $571.48, to the credit of the defendants. The bill of lading was attached to the draft.

To the question, "How much money did your bank advance to Tierney & Co. for the draft of $836.26?" the witness responded, "$830." To the further question, "Did not your bank reserve the right to charge back against Tierney's account with your bank the amount you advanced or paid to him for said draft of $836.26?" he responded, "There was no such reservation; being endorsers of the debt, the defendants made themselves liable in case it was not paid; further than to require their endorsement nothing was said." He testified that the bank had delivered the cotton to Metzger Bros. and received from them $697.99, less freight charges. The interpleader bank appealed from the judgment.

Boone, Bryant & Biggs, for the plaintiff.

Busbee & Busbee and *Manning & Foushee,* for the interpleader.

CONNOR, J., after stating the facts. We think that the exception to his Honor's ruling in submitting the second issue in regard to the draft of $574.48 should be sustained. The question raised by the interplea on the part of the bank is

correctly stated in the fifth issue, to-wit: "Was the cotton attached by the plaintiff the property of the Merchants National Bank at the time of levying the attachment?" Its ownership of the draft for $574.48 was entirely immaterial, and the submission of an issue in regard to it was calculated to prejudice the interpleader. His Honor, so far as the record shows, gave the jury no instruction in regard to the law by which they were to be guided in responding to this issue. The interpleader bank requested his Honor to charge the jury that if they believed the evidence to answer the first issue "Yes." We think that this instruction should have been given. It is true, as said by his Honor, that the burden of establishing its title to the cotton was upon the interpleader. *Wallace v. Robeson,* 100 N. C., 206. When, however, it introduced the draft with the bill of lading attached, and showed by the evidence of the cashier that it was in the possession of the bank, with an unrestricted endorsement, the presumption arose that it was a purchaser for value without notice of any defences or equities of the drawee or consignee. *Pugh v. Grant,* 86 N. C., 39; *Bank v. Burgwyn,* 108 N. C., 62, 23 Am. St. Rep., 49. There was no suggestion of any fraud in the inception or the endorsement of the draft. The draft was endorsed to the bank, and the proceeds, less the discount, passed to the credit of the defendants. There was no agreement that the amount was to be charged back if the draft was not paid. "Further than to require their endorsement, nothing was said."

As we understand the evidence, the bank advanced to the defendants $697.99 with which to pay for this identical cotton, paying Metzger Bros.' draft, with bill of lading attached for that amount. As a part of the transaction the same bill of lading accompanying this draft was attached to the draft for $836.26, drawn by the defendants to their own order and endorsed to the interpleader bank. In other words, the

defendants owed the bank $697.99, money advanced to pay for the cotton, and the proceeds of the draft in controversy were credited to them in discharge thereof, leaving a balance of $132.10 to the credit of the defendants, which was afterwards drawn out. This is the real transaction, stripped of the mysteries of book-keeping, which are always open to explanation. Why, then, was the bank not the owner of the draft and the cotton upon account of which it was drawn, at least to the amount advanced therefor?

It is well settled that when the vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order, and thereupon draws a draft payable to his own order upon the vendee, attaching the bill of lading, and endorses to a third party such draft for value, the title to the goods vests in the endorsee at least to the extent of the amount advanced. Daniel on Neg. Instruments, sec. 1734 (a). The law is thus stated and cited with approval by Mr. Daniel: "When the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and intending to resume the right of control over them, at the same time draws upon the purchaser for the price and delivers the bill of exchange with the bill of lading attached to an endorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor." *Emery v. Irving Bank,* 25 Ohio St., 360, 18 Am. Rep., 299; *Bows v. Ex. Bank,* 91 U. S., 618. This Court in *Finch v. Gregg,* 126 N. C., 176, 49 L. R. A., 679, recognized this almost elementary principle, carrying it to its fullest extent. It appeared that Gregg had shipped to certain persons a lot of corn and drew a draft on them with the bill of lading attached. The bill of exchange was endorsed to "The Seymour Danne Company." *Clark, J.,* said: "When

the bill of lading, payable to order of shipper, was assigned by him for value (*i. e.,* cashing the draft upon purchaser, attached), to the Seymour Danne Company, the latter became the owners of the corn as against all the world, except the shippers as to whom the assignment was a security for the amount of the draft." In that case a second lot of corn was shipped by Gregg to other persons and a draft with bill of lading drawn and endorsed to the same parties. When this second lot of corn reached its destination the parties to whom the first corn was shipped attached it as the property of Gregg, on account of a claim for damages sustained in the purchase of the first lot. The Seymour Danne Company came in and made themselves party defendant, and, upon showing themselves to be the purchasers of the draft, this Court held that while the corn attached was thereby the property of the Seymour Danne Company, the action should be dismissed as to Gregg, but permitted a recovery against the endorsees upon the principle that by the endorsement of the first draft with the bill of lading attached they became the real vendors and were liable for damages sustained by reason of a defect in quality of the first car load of corn. The Court said: "It is true the action was originally against Gregg alone, which could not be sustained, as no jurisdiction as to him was obtained by attaching the two car loads of grain, which by the assignment of the bills of lading had become the property of the Seymour Danne Company." In this case the bank only interpleads and does not make itself a party to the action.

The plaintiff relies upon the case of *Packing Co. v. Davis,* 118 N. C., 548. There the question arose between the owner of a draft, which had gone to protest, and the receiver of an insolvent bank. The facts were found by the Court, showing a course of dealing between the bank and its customers, and the Court said: "In the present case it is found

that the tacit agreement between the parties, from their course of dealings, was that though the amount was credited to the depositor and he could draw against it, yet if the paper so deposited was not paid on presentation, the amount thereof was to be charged up to the depositor's account or taken off his next deposit ticket. This stamps the transaction as being unmistakably a bailment for collection. As nothing had passed, the fact that the bank had simply given the depositor credit on its books would not make the bank a purchaser for value." The plaintiff had never drawn the amount of the draft, but had at the time of the failure of the bank a large balance to its credit. The Court, *Clark,* J., in concluding the opinion, citing *In re State Bank* (Minn.), 45 Am. St. Rep., 454, says: "Of course in all such cases the banker, like a factor, has a lien for advances made on the faith of the paper, and consequently the claim of the creditor may be modified by the state of his account."

In *Bank v. McNair,* 114 N. C., 335, it appeared that the defendants executed their note to the First National Bank of Wilmington for $5,000, and that this note before maturity, with others amounting to $17,000, was discounted by the plaintiff bank and the proceeds credited to the Wilmington Bank. About one-half of the proceeds of the lot of notes was paid out upon checks of the Wilmington Bank. The Wilmington Bank failed, the defendants having to their credit at said bank something over $4,100. This Court held that this transaction constituted the plaintiff bank a purchaser for value, saying: "It is true, if nothing had passed and the plaintiff had simply given the payee credit on its books, this would not have made the plaintiff a purchaser for value."

In *Cotton Mills v. Weil,* 129 N. C., 452, the facts as stated by *Clark, J.,* are: "When the shipment of fifty bales was made, Weil Bros. drew on the consignee, the plaintiff, the

bill of lading attached to the draft, for the value of the cotton in favor of the bank. The bank did not cash the draft, nor did it accept the same in settlement of Weil Bros.' indebtedness or any part thereof, but simply credited them with the amount of the draft, with the right on the part of the bank to charge it back to Weil Bros. in case the draft was returned not collected, and the bank sent the draft with the bill of lading attached to its representative in Baltimore, with "Collection" stamped on its face. When payment was refused by the drawee and the draft returned, *it was charged back* against Weil Bros. No money was passed, nor did Weil Bros. draw against the amount credited, nor could the bank officers remember whether they returned the draft and bill of lading to Weil Bros. after it was returned to them. The bank intervened upon the request of Weil Bros. and for their benefit." The Court correctly held that the bank did not become the owner of the draft or cotton. In *Boykin v. Bank,* 118 N. C., 566, the endorsement was "For Collection."

The facts in these cases distinguish them from this record. We cannot see how the fact that the defendants endorsed the bill of exchange prevented the bank being a purchaser for value. This was no more than additional security for its payment and in no manner affected the title to the cotton. Nor can we see how the testimony of S. A. Ashe that the endorsement "had been changed by making it a special endorsement" could affect the question involved in the issue. A blank endorsement may at any time be filled in to show who is the true owner of the bill. Daniel on Negotiable Instruments, sec. 694. The holder of a bill or note, endorsed in blank, may write over the endorsement any contract not inconsistent with the undertaking of the parties or the original contract. * * * In like manner he may write over the blank endorsement in full to himself or any other person. 4 Am. & Eng. Enc., 268, where the authorities are collected. We do

not find any evidence tending to show that the draft was received for collection.

New trial.

CLARK, C. J., did not sit on the hearing of this case.

STATE v. CAMPBELL.

(Filed September 22, 1903.)

1. EVIDENCE—*Injury to Property—Indictment—Agency—Fence—The Code, sec. 1062.*

In an indictment for pulling down and removing a fence surrounding a cultivated field, it is not competent for the defendant to show that he did the act as the agent of another person.

2. FENCES—*Injury to Property—The Code, sec. 1062.*

Under The Code, a cultivated field is one kept and used for cultivation according to the ordinary course of husbandry, and the smallness of the tract makes no difference.

3. FENCES—*Injury to Property—Evidence—Possession—The Code, sec. 1062.*

In an action for removing a fence from a cultivated field, the defendant cannot, as a defense, show title in himself, the prosecutor being in actual quiet possession.

DOUGLAS, J., dissenting.

INDICTMENT against Thomas Campbell, heard by Judge *G. S. Ferguson* and a jury, at April Term, 1903, of the Superior Court of PITT County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Skinner & Whedbee, for the defendant.

CLARK, C. J. This was an indictment under The Code, sec. 1062, for pulling down and removing a fence surrounding a cultivated field. The prosecutor testified that he was in possession of the field, which he had cleared and fenced six or seven years ago, and had used it for tobacco beds for several years in succession; that year before last he had planted sweet potatoes in it, and last year he sowed peas in it and had picked part of them, when he was taken down with typhoid fever, and on his recovery found that the fence had been torn down and removed, and that he heard the defendant admit that he tore the fence down and removed it. He testified that the field contains three-fourths of an acre to one acre. The defendant testified that it was only nineteen yards by fourteen yards; that last year the prosecutor sowed it in peas, and the year before had planted it in potatoes, and in previous years had used it as a tobacco bed, and that he (the defendant) tore down and removed the fence.

The Court properly ruled out, over the defendant's exception, his offer to show that he tore down the fence as agent for and under the direction of another. If the defendant violated the law, it is no defense that some one else requested or paid him to do so.

The Court charged the jury that if "they were satisfied from the evidence, beyond a reasonable doubt, that the prosecutor enclosed the fence six years ago and planted tobacco beds in the field, as described by the defendant, and sweet potatoes in 1901 and peas in 1902, as described by the defendant, and the defendant tore down the fence as described, they would return a verdict of guilty." The defendant again excepted, but there was no error.

In *State v. Allen,* 35 N. C., 36, *Nash, J.,* held that the statute applied where a piece or a tract of land had been cleared and fenced and cultivated, or proposed to be cultivated, and is kept and used for cultivation according to the

ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the removal of the fence, and even when the owner has no intention of raising anything on it at the time of such removal; that when land is resting, lying fallow, it is important that it should not be trodden by beasts of any kind, and to this end fences must be kept up and are protected by law. This ruling was cited and approved in *State v. McMinn,* 81 N. C., 585, in which case it was also held that the smallness of the tract made no difference; that a town lot, if enclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described.

If the defendant or those for whom he acted had a better title than the prosecutor, it could not be shown in this action. It is enough that the prosecutor was in actual quiet possession. *State v. Hovis,* 76 N. C., 117.

No error.

DOUGLAS, J., dissents.

STATE v. STATON.

(Filed September 22, 1903.)

1. INDICTMENT—*Burglary—Intent.*

The bill of indictment for burglary in this case sufficiently charges the intent with which the breaking was done.

2. BURGLARY—*Former Jeopardy—Intent.*

A conviction on an indictment for breaking and entering a dwelling with the intent to commit a felony will sustain a plea of former jeopardy on an indictment for burglary based on the same facts.

STATE *v.* STATON.

3. EXCEPTIONS AND OBJECTIONS—*Evidence—Sufficiency of Evidence—Intent—Burglary.*

The objection that there is not sufficient evidence of the intent with which the defendant entered a dwelling must be taken before verdict.

INDICTMENT against Fate Staton, heard by Judge *G. S. Ferguson* and a jury, at January Term, 1903, of the Superior Court of PITT County. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Skinner & Whedbee, for the defendant.

CONNOR, J. The defendant was put upon trial upon the following bill of indictment: "The jurors for the State upon their oaths present that Fate Staton, late of the county of Pitt, with force and arms at and in the county aforesaid, unlawfully did break and enter (otherwise than by burglarious breaking) the dwelling-house of one Bettie Grimes, with intent to commit a felony, to-wit, with intent the goods and chattels of the said Bettie Grimes, then and there in said dwelling-house being found, feloniously to steal, take and carry away, and with intent feloniously and violently and against the will of the said Bettie Grimes to carnally know and abuse, against the form of the statute, etc." The defendant moved to quash the bill of indictment for the reason that the bill attempted to particularize the felony, with the intent to commit which the defendant is alleged to have entered the house of the prosecutrix, to-wit, that of larceny or rape, and that the language used in the bill did not amount to a charge of rape. The motion was overruled and the defendant excepted.

His Honor correctly refused the motion to quash. The language of the bill in charging the intent with which the

defendant entered the house is sufficient. *State v. Titus,* 98 N. C., 705; *State v. Powell,* 94 N. C., 965 (970). The State introduced testimony tending to show that at twelve o'clock on the night of July 28, 1902, the defendant broke into the house of the prosecutrix by prizing open the window-sash, and that the prosecuting witness was in the actual occupation of the house at the time, and that the defendant was in his night clothes when he entered and left the house, and that he did not attempt to steal anything. The defendant offered evidence tending to show that he did not enter the house, and to prove an *alibi.*

The defendant requested the Court to charge the jury that the defendant cannot be convicted under the bill of indictment for the reason that if they believed the evidence for the State to be true, and that should the evidence convince them that the defendant was the person who broke into the house, in that event the defendant would be guilty of burglary in the first degree, and as this indictment and trial would not prevent his being put on trial for the greater offense of common-law burglary, they would acquit the defendant. The Court declined to give the instruction and the defendant excepted. His Honor committed no error in this respect. The defendant's prayer was based upon the assumption that his conviction upon this bill would not sustain a plea of former conviction upon an indictment for burglary based upon the same facts. This view seems to be met and disposed of in the case of *State v. Cross,* 101 N. C., 778, 9 Am. St. Rep., 49. *Smith, C. J.,* referring to the case of *State v. Shepard,* 7 Conn., 54, says: "It was decided that a conviction of an attempt to commit rape upon an indictment so charging was proper when the proof showed the rape was accomplished, and such conviction was a bar to another indictment preferred for the rape. And so it is held in *State v. Smith,* 43 Vt., 324, and the general principle is laid down that when

an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution of the other." This authority fully sustains his Honor's refusal to instruct the jury as requested. The defendant did not ask his Honor to instruct the jury that there was not sufficient evidence of the intent with which the defendant entered the dwelling. Such objection must be taken before verdict, and it cannot be made for the first time in the Supreme Court. *State v. Glisson*, 93 N. C., 506.

No error.

STATE v. GRAHAM.

(Filed October 6, 1903.)

1. ROBBERY—*Instructions—Evidence.*

In a prosecution for highway robbery, it is error in the trial judge to ask in his instructions: "Were the defendants concealed in the bushes near the public highway?" etc., there being no evidence of such facts.

2. WITNESSES—*Evidence—Relationship—Instructions.*

It is error to instruct the jury that because of interest they should carefully scrutinize the evidence of defendants, *without adding* that if the jury believe the evidence it should have the same weight as if the witness was not interested.

INDICTMENT against Henry Graham, heard by Judge *R. B. Peebles* and a jury, at January Term, 1903, of the Superior Court of LENOIR County.

The defendants, together with one O. H. Harrison, who was at the time of the trial dead, were indicted for highway robbery from the person of one L. K. Nicholson, who testified that on the 5th of November, 1902, he came to Kinston with

a load of tobacco. That after making some purchases and buying some whiskey he started home. That he took the wrong road and was turned back. That his horse's feet got entangled in a tramway near the Becton place. Some one stopped the horse. It was too dark for witness to tell who they were except by the color of their hair. That a ginger-cake-colored negro came around the wagon and placed a gun in witness' face, and another one came around on the other side and pulled his gun on witness; then the third one came up with a gun. It was a clear, open place. Witness did not see where they came from. They had two double-barrel guns and a single-barrel shotgun. They demanded his money. Witness told them that he had none. One of them said witness was a liar, that he saw witness go along that morning to Kinston with tobacco. That he had some money in his pocket; pulled it out and gave it to them. They then walked off. One of them said "Let's kill him." Another one said that would be too bad. That they asked witness if he had any whiskey. They reached in the wagon and got out a small jug of whiskey. That witness went about two miles and stopped at a school-house, where they were having prayer-meeting. Told persons there that he had been robbed by three negroes, but could not tell who they were. Witness then went on some three or four miles from the place of the robbery to John Dail's house and told him about it. Stayed all night at Dail's house. That he left for home early in the morning. That some persons came after him and told him to come back, that they thought they had found out who robbed him. They went back down in the neighborhood of the robbery. Witness swore out a warrant against the defendants. That he saw Robert Faucette after he was arrested, but could not identify him as one of the men. Witness then saw Henry Graham, but could not identify him as one of the men. That he "sorter thought that Harrison had a voice like one of the

men that robbed him." That he did not make any outcry about being robbed. That he did not tell George Holland that he had been to Kinston and gotten drunk and played hell, or that his wife and children needed every cent that he had worked for. Witness said that he did not know whether Graham was one of the parties or not; that he could not identify either him or Richard Faucette as one of the negroes that robbed him. That he did not make any effort to find out who robbed him. That he was on his way home when overtaken the next morning and told to come back. That he lived in Duplin County and farmed on the land of L. M. Cooper. That he did not tell Cooper that he was robbed. That he bought a quart of wine from John Dail on his way to Kinston the morning that he was robbed, and bought two jugs of whiskey in Kinston. That he had the pocket-book that he had in his pocket on the night of the robbery.

There was other testimony to the effect that O. H. Harrison and the two defendants were in a buggy drawn by a mule going in the direction of Neuse River low-grounds about ten o'clock in the morning. That they had guns in the buggy and said they were going hunting. That they had bought a quart of wine that morning. It was also in evidence that they were seen about sunset with two single-barrel guns and a double-barrel gun about a mile and a half from the scene of the alleged robbery. They said that they had been out hunting. Two witnesses by the name of Jarman testified that early in the morning after the alleged robbery of Nicholson they went in pursuit of him and overtook him a few miles from Dail's house on his way to his home in Duplin County. That they informed him that three colored men with guns were seen on the public road the previous evening, and they prevailed upon him to return and get out a warrant for those men. It was in evidence on the part of the defendants that the prosecutor came to the house of George Holland about seven o'clock

on the night of the alleged robbery. That he hailed at the gate. That he said he had been to Kinston with tobacco; that he had gotten drunk and played hell; that his wife and children needed all the money he had worked for. That he asked Holland to take a drink with him. That he did not appear excited at all and did not say anything about being robbed. That Holland's house was about a mile and a quarter from the place of the alleged robbery. This conversation was immediately after the time of the said robbery. There are several houses on the road before Nicholson got to Holland's house, and they are all occupied by families, and the houses are near the road, in speaking distance of the road. It was also in evidence by the witness Davis that the prosecutor stated that he had a conversation with Holland, but he did not tell him anything about the robbery; that he said he could not identify the negroes except by the color of their hair; that they had two double-barrel breech-loading guns and one single-barrel shotgun; that a ginger-colored negro put his gun in his (prosecutor's) face and demanded his money, and he told him he had no money; the negro told him he was a liar; that the day after the arrest of the defendants the prosecutor was carried before defendant Faucette and asked if Faucette was one of the negroes that robbed him, and he said "No"; that he looked at Harrison and said he did not think he was one; that he was then carried in the presence of the defendant Graham and asked if he was one of the negroes that robbed him, and he said he was not. That the place of the alleged robbery was a clear, open place, and in full view of Albritton's house, three hundred yards from the place. That there were four houses between where the alleged robbery was committed and the school-house where they were holding prayer-meeting, and these were all in speaking distance of the public road. The defendant Graham said that Faucette and himself went squirrel hunting in the morning; they went to the river low-

ground, and passed Harrison's house and he went with them. He testified, in regard to his movements of the day of the alleged robbery, that he did not know the prosecutor, and never saw him until after he was arrested; that he did not meet him on the road, and knew nothing of his being robbed. Faucette testified to the same effect. It was also in evidence that Albritton, who lives about three hundred yards from the place of the alleged robbery, was plowing in his field until after sundown; that he had fed his team and was standing around in the yard at dark; that he heard some one driving rapidly over the bridge across the public road, and he looked out and saw a man in a one-horse wagon, with some furniture, running his horse; that he was sitting up in the wagon holding the reins with both hands and had the horse under control; that he examined the place of the alleged robbery and could find no sign of buggy tracks or any men's tracks; that the prosecutor, before he reached the school-house where they were having prayer-meeting, had to pass by the witness' house, which is on the road, and he also had to pass other houses; that he did not see the negroes pass that evening, and he knows the defendants and they live in his neighborhood. There was testimony on the part of Dr. Wooten, coroner of the county, D. F. Wooten, sheriff of the county, and others, that the character of the defendant Graham was good. Granger testified to the good character of the defendant Faucette. L. M. Cooper, with whom the prosecutor lived, testified that he had known the prosecutor for twenty-five years; that he rented a farm from him; that his general character was bad, and that he never told the witness anything about the robbery. There was also testimony to show that the prosecutor was seen on the day of the alleged robbery asleep in his wagon. Witness thought that he was drunk, and told him he was on the wrong road, and he had to go back. It was in evidence that the prosecutor, on the day of the alleged robbery, was driving in

a single-horse wagon carrying furniture. In reply there was testimony on the part of the State that the prosecutor was heard speaking of the alleged robbery the day following, and that he said that it was impossible for him to tell who the parties were. Some one asked if he could identify them in any way, and he said that it was impossible for him to tell whether the men arrested were the right men or not; that the general character of the defendant Faucette was not very good. There was also testimony that the character of the prosecutor was good.

The defendant's counsel requested the Court to charge the jury that upon the whole evidence they could not be convicted. This was refused and defendants excepted. The record states that the Court in its charge to the jury said: "Where were the defendants during the long time that elapsed after their reaching the tramroad? Were they concealed in the bushes on this side of the tramroad and near the public highway, watching the approach of Nicholson? As to this matter, the jury have the right to consider the length of time which it took the defendants to make the journey on their return from the river low-grounds to their home, and that part of this time could have been occupied in lying in wait near the roadside." It is stated in the record that no contention was made by counsel for the State that the defendants had concealed themselves in the bushes on the Kinston side of the tramroad, which crosses the public road, and which was the scene of the alleged robbery, and lain there to watch for the approach of the prosecutor to rob him.

It appears by the record that the Judge further charged the jury that "the testimony of witnesses interested in the event of an action, as the defendants are in this case, is to be regarded with suspicion and carefully scrutinized by the jury, but the character which has been proved for them is also to be considered and given such weight as the jury may think it de-

serves. The defendants are interested in the verdict to be rendered in this cause and in keeping themselves from being sentenced to imprisonment in the penitentiary, which the law affixes as a punishment for the crime with which they are charged in this indictment; you will weigh their testimony as that of persons having such an interest in the event of this action, and also consider the good character proved for them, and you will give their testimony such weight as you may think it entitled to under all the circumstances." The defendants excepted to this part of the charge and appealed.

Robert D. Gilmer, Attorney-General, for the State.
Rouse & Ormond and *T. C. Wooten,* for the defendants.

CONNOR, J., after stating the case. It is by no means clear that, taking the testimony of the witnesses introduced by the State to be true, it did more than raise a suspicion of the defendants' guilt. The Attorney-General, with his uniform candor, conceded that the charge of the Judge, in regard to the manner in which the jury should consider the testimony of the defendants in their own behalf, was not in accordance with the decisions of this Court. We well understand that it is often difficult for the Court to avoid the use of expressions, in charging the jury, which are, under a critical examination, entirely free from objection. We would not grant a new trial for such cause unless it clearly, or at least reasonably, appeared that the language used was calculated to prejudice the defendant or mislead the jury. It is clear that, in stating the contentions or theories of the State and defendants, the Judge should state only such as are supported by some evidence. It is well settled by numerous cases in this Court that an instruction which involves a theory, in support of which there is no evidence, should not be given. It would be an invitation to the jury to speculate upon possible theories

and base their verdict on such speculation rather than upon the evidence. We do not discover any testimony upon which to base the theory that the defendants concealed themselves in the bushes near the public highway to watch the approach of the prosecutor. There is no evidence that there were any bushes on the side of the road. The prosecutor said: "It was a clear, open space." The form of expression adopted by the Judge was, we think, calculated to prejudice the defendants; it conveys to the mind the impression that the Judge thought that it was incumbent upon the defendants to account for themselves and explain their movements during the day.

In regard to the second exception: In *State v. McDowell,* 129 N. C., 523, 532, the Court instructed the jury to "scrutinize the evidence of the prisoner's relations with great caution, considering their interest in the result of the verdict, and after so considering the jury will give it such weight as they may deem proper." This was held by this Court to be erroneous, following the rule laid down in *State v. Collins,* 118 N. C., 1203.

In *State v. Holloway,* 117 N. C., 730, the instruction was that the jury "had a right to scrutinize the testimony of the defendants and receive it with grains of allowance on account of their interest in the event of the action." This upon exception was held erroneous, the Court saying that "This charge is capable of misleading the jury into the impression or belief that the evidence of interested parties is to be to some extent discredited, although the jury may think the witness is honest and has told the truth. His Honor should have gone further and explained to the jury, after having called their attention to the interested relation of the witness, that if they believed the witness to be credible they should give to his testimony the same weight as other evidence of other witnesses." A charge conforming to this rule, in *State v. Byers,*

100 N. C., 512, was approved by this Court; also in *State v. Boon,* 82 N. C., 637.

In *State v. Lee,* 121 N. C., 584, this Court disapproved the following "strong and significant language": "The wife is a competent witness in behalf of her husband, but in view of the close relationship between them, and the cloud of suspicion cast upon her testimony, the law says the jury should scrutinize her testimony with great severity."

In *State v. Apple,* 121 N. C., 584, the Court approved the instruction to the jury: "It was their duty to scrutinize the testimony of near relations, but they could not reject it on that account, and that, after thus scrutinizing their testimony, if they believed they had sworn the truth they should give it the same weight as if they were not related to the defendant."

His Honor's instruction upon this point is not in accord with the rule laid down by this Court.

For the error pointed out the defendants are entitled to a New trial.

STATE v. LEWIS.

(Filed October 6, 1903.)

LARCENY—*Evidence—Drunkenness.*

On a trial for stealing money from prosecutor while drunk, the state having, as a basis for the argument that defendant was preparing to take it, shown that after taking it from prosecutor's pocket, at his request, to pay for the liquor, he, in putting it back, called the attention of the clerk to the fact, he, to explain this conduct, may show that prosecutor was in the habit of losing money while drunk and wrongfully accusing people of stealing it, and that he knew of this habit.

INDICTMENT against Thomas Lewis, heard by Judge *R. B. Peebles* and a jury, at March Term, 1903, of the Superior

Court of LENOIR County. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Swift Galloway and *Land & Cowper,* for the defendant.

CONNOR, J. The defendant was tried upon an indictment for the larceny of money from the person of John Grant. It was in evidence on the part of the State that the prosecutor sold tobacco in Kinston and in company with defendant, who had brought tobacco for him to market, got the money at the bank for a check received in payment of his tobacco; that prosecutor and defendant went to a bar-room and took a drink and bought a jug of whiskey. At request of prosecutor defendant put his hand in prosecutor's pocket and got the money, which was in a tobacco bag, paid for the liquor and put the money back into prosecutor's pocket, calling the attention of the clerk to the fact that he had replaced the bag containing the money. Prosecutor swore that after this he, with the defendant, went back to the warehouse, where prosecutor laid down and went to sleep. That defendant put his hand in his (prosecutor's) pocket and took the money out. That he said: "Tom, don't take my money." Defendant said nothing, but took the money. On cross-examination defendant asked prosecutor if he had not been in the habit of losing money when drunk and accusing other people of stealing it, to which the witness answered "No." The defendant proposed to show by witness, introduced by himself and by his own testimony, that on a great many occasions the prosecutor had wrongfully accused people of stealing his money while he was drunk. That he was in the habit of getting drunk and losing money and accusing people of stealing same, and that defendant had heard and knew of this habit. The proposed testimony was, upon the objection of the State, excluded, to which the defendant ex-

cepted. It seems that his Honor was of the opinion that the question asked the prosecutor was collateral to the issue and that, not coming within any of the exceptions to the general rule, the defendant was bound by the answer of the witness. *State v. Patterson,* 24 N. C., 346. We are of the opinion that the testimony proposed to be elicited was competent. The prosecutor had sworn that he had been drinking and was asleep when the money was taken. The defendant's plea of not guilty involved a denial that he had taken the money. The defendant's counsel in their well-considered brief and oral argument contend that the testimony is competent in another point of view. It was shown by the State that when the prosecutor and the defendant were in the bar-room the defendant, at the request of the prosecutor, took the money from his pocket and paid for the liquor; that when he replaced the bag containing the prosecutor's money in his (prosecutor's) pocket the defendant called the attention of the clerk to this fact. This testimony was introduced as the basis for the argument that the defendant was preparing to take the prosecutor's money; that he was seeking to disarm suspicion by calling the attention of Odom, the clerk in the bar, to the fact that he had replaced the bag of money in the prosecutor's pocket. This conduct on the part of the defendant was clearly competent and properly admitted for this purpose. For the purpose of explaining this conduct and repelling the contention of the State he should have been permitted to show the habit of the prosecutor respecting the loss of his money and his knowledge of such habit. It is a matter of common observation and experience that men are more cautious and careful in dealing with the money or property of persons who are in the habit of drinking to excess, or who are illiterate or who are known to be suspicious of persons with whom they have dealings. This is a matter of common prudence. It would be a hard measure if one, taking the precaution to protect him-

self against an unfounded charge of dishonesty, should have his conduct converted into an argument tending to show a preconceived guilty purpose and not be permitted to explain the reasons which prompted his conduct. We can well understand how the Solicitor could use with telling effect the conduct of the defendant in this respect, and without explanation it would weigh heavily in the scale against the defendant. When it was admitted the explanation should also have been admitted, to the end that the jury should be able to properly estimate its value in arriving at a verdict. His Honor was in error in excluding it. We do not deem it necessary to pass upon the exceptions to his Honor's charge. The defendant is entitled to a

New trial.

STATE v. HULLEN.

(Filed October 6, 1903.)

1. LARCENY—*Evidence—Possession.*

In an indictment for larceny, evidence that the defendant had in his possession goods stolen at the same time at which those were stolen for which he was indicted is competent.

2. LARCENY—*Recent Possession—Evidence.*

In an indictment for larceny of goods from a dwelling in the day-time, recent possession by the defendant of the stolen goods is a circumstance tending to prove that the defendant entered the dwelling from which the goods were stolen.

3. LARCENY—*Punishment—Acts 1895, ch. 285.*

Acts 1895, ch. 285, limiting the punishment in certain cases of larceny, is not applicable to larceny from the dwelling by breaking and entering in the day-time.

STATE *v.* HULLEN.

INDICTMENT against Hunch Hullen, heard by Judge *R. B. Peebles* and a jury, at March Term, 1903, of the Superior Court of NEW HANOVER County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
B. G. Empie, for the defendant.

WALKER, J. The defendant was indicted for breaking and entering the house of the prosecutor and stealing a watch therefrom. There were two counts in the bill, one for breaking and entering with intent to steal the goods and chattels of the prosecutor and the other for breaking and entering with intent to steal his goods and chattels, and actually stealing from the said house one watch, the property of prosecutor's daughter.

The evidence tended to establish the following facts: That the prosecutor's house was entered on January 19, 1903, about the dinner hour, and several articles were taken and carried away, among them being a watch and a brown leather pocket-book with silver fringe around the corners. The day after the house was entered the defendant and one Wash McNeill, who was indicted with him and acquitted, were seen together at the C. C. R. depot in Wilmington by Thomas Hawkins, a witness for the State. McNeill offered to sell Hawkins a silver watch for ninety cents, and the offer was accepted, but the defendant had nothing to do with the sale. This watch was identified by the prosecutor at the trial as the one which had been taken from his house, and he testified that it was worth $7.50. McNeill had two gold watches and offered to sell one of them to William Jones, who bought it and then returned it, as his suspicion had been aroused by the cheapness of the watch. McNeill got the two gold watches and the silver watch, about the time the property was stolen from the prosecutor's house, from the defendant, who asked him to

sell them for him and divide the profits. McNeill was not in the part of the city where the prosecutor lived on the day the house was entered. The defendant on that day was seen by one Joe Hill at an old lot about three and a half blocks from the prosecutor's house, and Hill talked with him. "Hullen pulled from his pocket a leather pocket-book and removed the silver or metal edges from it." Hill asked him why he did that and he said that he did not like fancy pocket-books. The defendant did not introduce any evidence. His counsel objected in apt time to the evidence concerning the pocket-book because it was irrelevant, and also because the pocket-book had not been identified and was not mentioned in the indictment.

The defendant requested the Court to charge the jury as follows:

First. That as there were two counts, one for breaking into the dwelling in the day-time and stealing therefrom a watch and the other for stealing a watch, and as there was no evidence that Hullen had ever been seen near the house of Fowler, nor that he had ever been seen or found with the stolen property, the jury should not consider the first count in the indictment against the defendant Hullen, viz., house-breaking. As to the second count for stealing a watch, that, unless they believed the unsupported and bare statement of McNeill, a co-defendant and interested, as there was no evidence against him by the State's witnesses, they should acquit Hullen on the second count.

Second. That the jury, in the absence of the pocket-book and its identification, cannot assume that the book was the pocket-book taken from the residence of Fowler, and Hullen's possession of it cannot be taken as evidence showing that Hullen entered the dwelling of said Fowler, and Hullen should be acquitted on the first count.

Third. Taking the whole evidence, it showed only a scin-

tilla, and was not, therefore, sufficient to be submitted to the jury, and Hullen should be acquitted.

These instructions were refused by the Court and the defendant excepted.

We have made a brief statement of what the evidence tended to show, not because the facts set forth were actually established by the proof, for whether they were so established was a matter within the exclusive province of the jury to decide, but in order to show some evidence sufficient, as the law regards it, to be submitted to the jury upon the question of defendant's guilt.

If the jury believed the evidence, it tended to show that the defendant was in possession of the watch on the day after the house was entered. The only testimony introduced to established this fact, it is true, was that of the witness McNeill, and it may be that the jury should not have believed him, but whether he was credible or not was a question solely for the jury, and we cannot pass upon it. We also think that the testimony of the witness Hill as to the leather pocket-book was competent. It related to a fact which the jury were entitled to consider with the other facts and circumstances in the case. It is contended that the pocket-book was not sufficiently identified. It may be that the evidence in this respect and of itself was not very complete or of a very conclusive nature, but still we think it was sufficient for the jury to consider upon the question of identity. *State v. Bruce,* 106 N. C., 792; *State v. Kent,* 65 N. C., 311. The general description of the pocket-book as given by the witness Hill and that given by the prosecutor corresponded, and this correspondence, together with the further fact testified to by the witness McNeill that he got the watch from the defendant Hullen, which was fully identified by the prosecutor and which was stolen at the same time as the pocket-book, was quite sufficient as legal evidence of the identity of the pocket-book. The

evidence as to the pocket-book was not incompetent because the pocket-book was not mentioned in the indictment. The evidence was introduced, not to convict the defendant of stealing the pocket-book, but for the purpose of showing his possession of one piece of the stolen property, as tending to prove that he stole the articles described in the bill, which were taken at the same time. *State v. Patterson,* 78 N. C., 470; *State v. Jeffries,* 117 N. C., 727; *State v. Bruce, supra; State v. Kent, supra.*

This Court has said that "it is an established rule of evidence that when, on a trial for larceny, identity is in question, testimony is admissible to show that other property which had been stolen at the same time was also in the possession of the defendant when he had in his possession the property charged in the indictment." *State v. Weaver,* 104 N. C., 760; McClain's Cr. Law, sec. 514.

This case in its peculiar facts and circumstances resembles very much the case of *State v. Bruce, supra.* There was no error in the admission of testimony.

We will now consider the effect of the evidence introduced by the State. Recent possession of stolen property has always been considered as a circumstance tending to show the guilt of the possessor on his trial upon an indictment for larceny. It is not necessary that we should here draw any nice distinctions concerning the presumptions of guilt based on recent possession as being strong, probable or weak, because the Court in its charge, to which there was no exception, instructed the jury that the recent possession of the defendant was only a circumstance to be weighed by them in passing upon his guilt, and this charge is sustained, we believe, by all the authorities. *State v. Graves,* 72 N. C., 482; *State v. Rights,* 82 N. C., 675; *State v. Jennett,* 88 N. C., 665; *State v. McRae,* 120 N. C., 608, 58 Am. St. Rep., 808. If recent possession of the stolen goods is evidence that defendant com-

mitted the larceny it must also of necessity be evidence of the fact that the defendant broke and entered the house, because it is evident that the larceny was committed in the house by the person who broke and entered it, and there is no evidence that it was committed in any other way. *State v. Graves, supra.* "If the breaking and entering are charged as with the intent to commit larceny, the possession by the defendant, soon after the crime, of goods shown to have been stolen from the premises broken and entered tends to show that defendant is the one who committed the burglary, unless such possession is in some way explained." McClain's Cr. Law, sec. 514.

It follows from what we have said that the Court below was right in refusing the defendant's prayer for instructions.

The defendant also excepted upon the ground that under chapter 285, Acts 1895, the sentence of three years imprisonment was excessive, as under that act the punishment cannot exceed imprisonment for a longer term than one year when the value of the stolen property does not exceed twenty dollars. But upon examination of that act it will be found that it does not apply to cases of "larceny from the dwelling by breaking and entering in the day-time."

Our conclusion is that there was no error in the rulings of the Court below and there is none in the record. It will be so certified.

No error.

STATE v. CLENNY.

(Filed October 6, 1903.)

CASE ON APPEAL—*Appeal—Solicitor.*

In a criminal case an appellant must tender to the solicitor of the district where the case is tried a statement of the case on appeal for acceptance or rejection, and the acceptance of service of such statement by an attorney appearing for the private prosecutor is insufficient.

INDICTMENT against John Clenny, heard by Judge *R. B. Peebles* and a jury, at Spring Term, 1903, SAMPSON County Superior Court. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
F. R. Cooper and *J. D. Kerr,* for the defendant.

MONTGOMERY, J. The statement of the case on appeal is signed by the attorneys for the appellant defendants, and below their signatures there is an entry in these words: "The State failed to file any exception or counter-case." It does not appear in the record that the case was ever tendered to the solicitor of the district, and in *State v. Cameron,* 121 N. C., 572, it was held that in appeals in criminal actions the statement of the case by the defendants should be submitted to that officer for acceptance or objection. On the call of the case in this Court the attorney of the appellants was permitted to file a paper-writing, signed by the Clerk of the Superior Court of Sampson County, in which that officer certified that he had, through inadvertence, failed to send up as a part of the case an entry on the back of the case in these words: "Service accepted and copy waived, March 18, 1903. Faison & Grady." There was also filed in this Court a statement,

signed by Faison & Grady, "per Henry A. Grady," to the effect that they appeared with the solicitor for the State; that on the appeal time was agreed upon to make out the case on appeal and to make out a counter-case; that within the time agreed upon the defendants filed in the clerk's office their statement of case on appeal, and that Faison & Grady accepted service thereof and waived copy; that no counter-case was filed, but that Faison & Grady, with the solicitor and the counsel for the appellants, met before *Judge Peebles* and went over the defendant's statement of case, and that "we finally decided not to file any counter-statement and to let the case go up on the defendant's statement of the case on appeal."

We are of the opinion that the acceptance of service of the appellant's case on appeal by Faison & Grady does not meet the requirements of the law for the purpose intended. The solicitor, as we said in *State v. Cameron, supra,* represents the State in criminal prosecutions, and the statement of the case on appeal in such cases should be submitted to him for acceptance or objection. * * * An attorney who simply appears for a private prosecutor only aids the State in the trial, but does not represent the State in the sense of one of its sworn officers.

However, out of favor to the appellants, this matter will be remanded to the Court below, with instructions to the clerk to send at once to the solicitor of the district a copy of the case on appeal, together with a copy of the statement of Faison & Grady, to the end that that officer (the solicitor) may make such entry upon the case on appeal as may embody what took place before his Honor *Judge Peebles* at the time mentioned in the statement of Faison & Grady, and that the statement of the solicitor be returned to this Court by the Clerk of the Superior Court of Sampson County.

Of course we do not mean to intimate that the statement of Faison & Grady is not a correct statement of what occurred

before *Judge Peebles,* but we think it safer to lay down the general rule that the signature of the solicitor, a sworn officer, should appear in the make-up of all criminal actions on appeal where he is present at the trial.

Remanded.

STATE v. LEW.

(Filed October 6, 1903.)

INDICTMENT—*Grand Jury—Jury—The Code, secs. 404, 921—Acts 1901, chs. 28, 29—Acts 1903, ch. 533.*

Under The Code, sec. 404, 921, acts 1901, chs. 28, 29, and acts 1903, ch. 533, a grand jury may be summoned for the term of the superior court for New Hanover county held on the fifth Monday after the first Monday in March.

INDICTMENT against William Lew, heard by Judge *R. B. Peebles* at April Term, 1903, of the Superior Court of NEW HANOVER County. From an order quashing the indictment the State appealed.

Robert D. Gilmer, Attorney-General, for the State.

Herbert McClammy, Rountree & Carr and *John D. Bellamy,* for the defendant.

CLARK, C. J. The indictment in this cause was found at the term of the Superior Court held for New Hanover County "on the fifth Monday after the first Monday in March." The defendant moved to quash on the ground that such term was for "the trial of civil cases only."

The terms of court for New Hanover are prescribed by chapter 533, Laws 1903, which provides for nine terms, three of which are to continue two weeks and six to continue one week each. There is no provision that any of these nine terms

are exclusively either for civil or criminal business. The Code, section 404, provides for a grand jury at every term of the Superior Court, and section 1609 contemplates the same. Laws of 1901, ch. 28, sec. 3 (which part of the act is not repealed, provides that no grand jury shall be drawn for terms that are "for the trial of civil cases only." The Code, sec. 921, contains the only other restriction (in the absence of any special provision as to a particular county in some statute), *i. e.*, "there shall be no grand jury *at any special term* unless the same shall be ordered by the Governor."

The defendant relies upon chapters 28 and 29, Laws 1901. It was therein provided that New Hanover should have ten terms of court, one of which for two weeks, and six with no limit, were "for the trial of criminal business exclusively," and three of two weeks each "for the trial of civil cases exclusively." The act of 1903, ch. 633, differs from said act of 1901, in that it provides nine terms instead of ten; that only three terms instead of four are to be for two weeks; that instead of six terms, whose duration was not limited in the act of 1901, these other terms are to "continue one week"; that the time for holding court is changed as to most of the terms, and especially in that the provision in the act of 1901 that certain terms are to be "exclusively for the trial of civil business" and certain others are to be "for the trial of criminal business exclusively" is omitted in the act of 1903. In view of this last fact and the other changes above recited, and the provision in the act of 1903, "all terms of said courts within said district established by chapters 28 and 29, Public Laws 1901, in conflict with this act are hereby abolished," and the further provision, "All laws and clauses of laws in conflict with this act are hereby repealed," we cannot hold that because the act of 1903 provides a term "beginning on the fifth Monday before the first Monday in March, to continue for two weeks," and that one of the terms provided by the act of 1901

happened to be a two weeks term on the same date and had annexed thereto "for the trial of civil cases exclusively," that therefore the two-weeks term at that date, under the act of 1903, must have read into it the words "exclusively for the trial of civil business." The omission of the provision dividing the terms in New Hanover County into certain ones for trial of civil cases and certain ones for trial of criminal business is legislative and we cannot prescribe its continuance when omitted in the act of 1903. The omission was doubtless made intentionally. It could scarcely have been inadvertently, for the whole schedule of courts for the county is repealed and a new one adopted in which the number of terms and dates of holding them are changed, and those whose duration is unlimited in the act of 1901 are limited in duration in the act of 1903.

But whether the change was intentional or not, it was made by the statute of 1903, and there being now no provision by which the term at which this bill was found was restricted to civil business, nor any prohibition of a grand jury at such term, the bill was improperly quashed.

This Court has held the division of terms - some to be for civil business and the others for criminal business--to be constitutional, and has expressed the opinion that such division of the terms of the Superior Court, where several terms are provided for a county, is expedient and calculated to facilitate the speedy and orderly administration of justice. But whether in any county the division should be made and certain terms allotted for civil business and others for criminal business is a matter for the Legislature. It did provide such division for New Hanover in the act of 1901, but that part of the act was repealed and this provision is omitted in the act of 1903 (ch. 533), which prescribes the terms of court for New Hanover.

Reversed.

STATE v. ADAMS.

(Filed October 20, 1903.)

LARCENY — *Receiving Stolen Goods — Instructions — Indictment — Counts.*

Where an indictment charges in one count larceny and in another the receiving of stolen goods, and the instructions relate only to the first count, and the defendant is found guilty on the second count, a new trial will be granted.

INDICTMENT against H. B. Adams, heard by Judge *H. R. Bryan* and a jury, at July Term, 1903, of the Superior Court of ROBESON County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, and *McLean, McLean & McCormick,* for the State.

McIntyre & Lawrence, for the defendant.

CONNOR, J. The defendant was indicted in one count for the larceny of two sacks of guano, and in the second count for receiving the said two sacks of guano knowing them to have been stolen.

The State introduced J. W. Carter, who testified that he lived in Maxton and was a merchant; that on the night of May 20th his warehouse was broken open and some Acme Guano taken out. Several sacks were lost. That he saw tracks at the back of the door of the warehouse, and about thirty or forty steps away he found wheelbarrow tracks. Same tracks from back door to wheelbarrow. That he followed the wheelbarrow down the railroad and across through the woods and struck a cotton-patch that defendant cultivates right near his house. That the track went by end of cotton

rows and then struck the main road within about fifty yards of defendant's house and then went up to a shelter at or near his back door. That he saw defendant next morning; met him at end of cotton rows. That he was dragging his feet like he was trying to cover up tracks. That they passed each other and defendant said "good morning." Witness told him that some one had broken into his warehouse the night before and had taken two sacks of guano and that he had followed the wheelbarrow tracks, and witness said: "Now, Adams, pretty close to your house." Witness asked him if he knew anything of the fertilizer. Defendant said "Yes," that there were two sacks in that shelter. They went to the shelter and found two sacks of fertilizer covered up. They began to uncover it. Defendant said he didn't know how it got there; that the year before he had bought some from some of the boys; that perhaps Jesse McLean put it there. McLean came up about this time and Adams asked him if he put it there. McLean said: "You know very well I had nothing to do with it." Witness went back to town and got out a warrant. That he could not find where tracks led from the shelter. That he found the wheelbarrow some five hundred yards away in a ditch. Bushes had grown up beside the ditch. That they found a place near the railroad where it looked like the whole load, wheelbarrow and all, had been upset. Milton McRae claimed the wheelbarrow. That defendant requested that Jesse McLean be called as a witness before the magistrate. He asked the deputy sheriff to get him as a witness, but he did not ask the magistrate to subpœna him.

Andrew Wilkinson, who was introduced for the State, says that he saw the wheelbarrow in the ditch on the night of the 20th about 12 o'clock; that he went after Andrew Malloy, and when he came back the wheelbarrow and guano were gone; that he saw the back door of Carter's warehouse open, and saw tracks the next day and measured the tracks; that the

heel was slightly curved in front and worn at back, and he measured defendant's shoe and it was the same as the tracks—front part of heel was curved: that he saw defendant's shoe put in the tracks—fitted exactly—he saw the tracks following the wheelbarrow and they looked like those he had measured.

Defendant testified that he did not leave his house during the night; that his wife was about to be confined; he saw the guano there early the next morning and told Robert George about it; that he was not kicking out tracks, but was kicking in the dirt to see if it was wet enough to set out potato slips; it had rained the night before.

The defendant's wife testified that her husband was home all night, and she was expecting to be confined and did not sleep well; that she was confined on the 24th; that on Friday morning the defendant spoke to her about the guano, and said he did not know where it came from.

Robert George, witness for the defendant, testified that he saw the defendant the next morning and he said there was some guano that should be moved.

His Honor charged the jury among other things as follows: "The law is that a person found in such recent possession of stolen property that he could not reasonably have gotten possession unless he had stolen it raises a presumption of his guilt and throws the burden on the defendant to account for his possession. If you find that Carter's property was stolen and found next day in defendant's possession, and he has failed to account for it to your satisfaction, then you will find him guilty." Defendant excepted. The jury returned a verdict "guilty of receiving good knowing them to have been stolen," and from the judgment rendered thereon the defendant appealed.

We must assume that the charge is correctly set out in the record, and as it nowhere appears therein that his Honor

gave any instruction to the jury upon the second count in the bill of indictment, or directed their attention to the testimony or law bearing thereon, we think the defendant is entitled to a new trial. The verdict omits any finding on the first count, and thus leads to the conclusion that the jury did not find that the defendant made the track following the wheelbarrow to the shelter under which the guano was found. It is by no means clear that the guano was, in the usual or legal signification of the term, found in the *possession* of the defendant. The shelter was open, easily accessible to any one, about fifty yards from the public road and near the defendant's back door. It is evident that but one person carried the guano to the place where it was found. The wheelbarrow was not the property of the defendant, nor was it shown that any tracks were found returning to the defendant's house from the place where it was found. So soon as the defendant is asked by the prosecutor whether there was any guano on his premises he promptly responded and showed it to him. Eliminating the tracks, and taking it as found by the jury that they were made by some person other than the defendant, the only evidence connecting him with the larceny is the fact that the guano is found in an open buggy-shelter on his premises the morning following the larceny. His conduct was not, it seems to us, inconsistent with that of an honest man. While we do not say that there was *no* evidence fit to be considered by the jury, we think the Judge should have instructed them in regard to the facts necessary to be found before they could convict the defendant upon the second count in the bill. His charge in regard to the presumption arising from possession was limited to the general verdict of guilty without regard to the separate and distinct charges contained in the bill. The presumption which the law raises from the recent possession of stolen property is that the person having such possession is the thief, not that some one else being the thief the defend-

ant's possession is with guilty knowledge of the theft. Certainly if one awoke in the morning finding a stolen horse in his stable, and it being shown that some other person put it there, the law would raise no presumption that it was done with the knowledge of the owner of the stable. This would be a hard rule, and in direct contravention of that which *Mr. Justice Ashe* lays down in *State v. Massey,* 86 N. C., 660, 41 Am. Rep., 478, quoting the dissenting opinion in *State v. Neely,* 74 N. C., 425, 21 Am. Rep., 496, which was adopted as the law: "It is neither charity nor common sense nor law to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. * * * The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." The charge of his Honor, assuming that the stolen property was found in the possession of the defendant, says to the jury that the law presumes that he is *guilty.* The question arises: guilty of what? The law says: of the theft. The jury say he is not guilty of the theft, but is guilty of receiving, etc. Under the general charge of his Honor, the jury may well have applied the language to the second count and found him guilty "by presumption of law," as was the view of Mr. Saddletrees in the case of Scott's unfortunate heroine, Effie Deans. Presumptions of law are useful to courts and juries in seeking to ascertain the truth, but the criminal records of all ages and people have shown that great and often irreparable wrongs have been done when they are pressed too far. It may well admit of question whether it be not more consonant with the genius of our law to permit the juries, under proper instruction of the Court, to find the truth as they believe it to be, certainly in criminal cases, drawing such inferences and conclusions from admissions and facts proved to their satisfaction as experience, observation and reason suggest. The facts in regard to finding the

guano, the place in which it was found, the time at which it was found, the conduct, language, etc., of the defendant, are all circumstances to be considered by the jury, subject to all such reasonable and just inferences as they may draw therefrom. The distinction between a presumption of law and an inference of fact is clearly pointed out by *Walker J.*, in *Cogdell v. Railroad,* 132 N. C., 852.

New trial.

STATE v. CROOK.

[TWO CASES.]

(Filed October 27, 1903.)

1. EVIDENCE—*Witnesses—Declarations.*

Where a prosecuting witness is asked as to a conversation and denies it, the answer to which would be calculated to show the temper and disposition of the witness, the defendant is entitled to show that the declaration was made, though the the time was not the same as that stated to the witness.

2. ASSAULT—*Excessive Force—Trespass.*

While excessive force may not be used in removing a trespasser, the owner of the premises may use sufficient force under all the circumstances to remove him.

INDICTMENTS against Jeff Crook and Frank Crook, heard by Judge *C. M. Cooke* and a jury, at August Term, 1903, of the Superior Court of UNION County. From verdicts of guilty and judgments thereon the defendants appealed.

Robert D. Gilmer, Attorney-General, for the State.
Adams, Jerome & Armfield, for Jeff Crook.
Redwine & Stack, for Frank Crook.

STATE *v.* CROOK.

MONTGOMERY, J. Jeff Crook was indicted for an assault and battery on Frank Crook, and Frank Crook and Sallie Crook were separately indicted for an assault and battery on Jeff Crook, in the Superior Court of Union County, and the two cases were by consent consolidated and tried together at the August Term, 1903, of that Court. Jeff and Frank both were convicted and both appealed to this Court. We will treat the two appeals in one case.

JEFF CROOK'S APPEAL.

Frank Crook, as a witness for the prosecution, was asked on his cross-examination if he did not tell Jim Crook, the father of John (John being present when the affray occurred), that if John did not testify on the trial that Jeff Crook used the knucks and pistol in the fight, and did not testify as Frank wanted him to, that he would have John indicted; and if this conversation did not occur about two or three weeks after the fight. Frank denied that any such conversation occurred there or at any other time or place. Jim Crook was then introduced as a witness for Jeff, and it was proposed to prove by the witness that about two or three weeks after the fight Frank Crook had the conversation with him as above narrated. The witness stated that the conversation occurred at Rachel Crook's, but that it was only about *four days* after the fight. Frank Crook objected to the testimony offered, and the objection was sustained by the Court, and the testimony rejected on the ground that the time fixed by the witness was not the time asked about in the question to Frank Crook. That is the only exception appearing in Jeff Crook's appeal.

Assimilating the matter sought to be proved, to-wit, the bias or temper of the witness Frank Crook toward the defendant Jeff to that of the contradiction of a witness, it was necessary,

generally speaking, to prove the time when and the place where the conversation was alleged to have occurred and the person with whom it was had; but the rule must not be iron-clad; *State v. Glynn,* 51 Vt., 579; *South R. Co. v. Williams,* 113 Ala., 620; and must not be reduced to a petty technicality. The question concerned a collateral matter, it is true, but it was calculated to show the temper and disposition of the witness, and was therefore competent and the subject of contradiction. *State v. Patterson,* 24 N. C., 346, 38 Am. Dec., 699; *Kramer v. Electric Light Co.,* 95 N. C., 277. His Honor took that view of the question, but he thought that the witness in contradiction should prove the *exact time* designated by Frank Crook of the occurrence of the conversation. We think he was in error. In *Nelson v. Iverson,* 24 Ala., 9, 60 Am. Dec., 442, the time fixed in the question to the witness was whether he heard the conversation in the spring of 1830, and the witness was allowed to be impeached by proving that the statement denied was made in February, 1830. The Court in that case said: "To suppose that with a recollection of the conversation she was shielding herself under the *letter* of the inquiry as to time, disregarding the other concurrent circumstances of place, person and subject matter, all which pointed her to the true answer, would tend more strongly to discredit her testimony than the proven contradiction; for as to the latter she may have forgotten, or the discrediting witness himself may be mistaken, while under the former hypothesis her testimony would amount to an artful evasion of the true answer. We think the proof was properly admitted."

In the editor's note on section 462 of Greenleaf on Evidence it is said on this subject: "The inquiry of the witness to be discredited must specify, it is usually said, the time, place and person (addressee) of the supposed inconsistent statement; but the fixing of this specified form is to be deprecated, for

it leads to innumerable petty technicalities; in principle and policy the inquiry need merely state enough fairly to recall the statement to the witness' mind if he has made it."

New trial.

FRANK CROOK'S APPEAL.

There was evidence to the effect that Jeff Crook came to the home of the defendant Frank very drunk and profane; that he cursed Frank's sister and others on the premises, and that Frank took hold of him to put him in his buggy that he might get him to his home; that Jeff resisted and made an assault upon Frank with iron knucks and a pistol, inflicting severe injuries on him, and that a desperate fight took place. His Honor instructed the jury that "If Jeff Crook, after he reached Frank Crook's place, conducted himself in such a way as to make himself objectionable, as testified by some of the witnesses, Frank had the right to direct him to go away, and if he did not go away he had the right to try to gently remove him, but if he became angered in consequence of what Jeff said and assaulted him, that is, laid violent hands on him, then he would be guilty." We think there was error in that instruction. We think the true rule which should have controlled the conduct of Frank upon the evidence on the point was that he had the right in the first place to direct Jeff to leave his premises; that in case of refusal he might have laid his hands on him gently, for the purpose of removing him from his premises; and if that course did not bring about the desired result, then he might have used sufficient force under all the circumstances to put him off. The law would not authorize one to use excessive force in removing a trespasser from one's premises, but the jury should not weigh in golden scales the amount of force used for such a purpose. In following such a course it would make no difference that the owner of the premises should become angered at such an

invasion of his home. It was but natural that such a feeling should be aroused. *State v. Taylor*, 82 N. C., 554.

New trial.

STATE v. SIMPSON.

(Filed October 27, 1903.)

1. WITNESSES—*Admissions—Evidence—The Code, sec. 1145.*

The admissions of a prosecuting witness are admissible against him on another trial for the same or any other offense.

2. WITNESSES—*Admissions—Evidence—Defendants—The Code, secs. 1353, 1145.*

Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial.

3. FORNICATION AND ADULTERY—*Arrest of Judgment—The Code, sec. 1041.*

In a prosecution for fornication and adultery one defendant may be convicted and the other acquitted.

DOUGLAS, J., dissenting.

INDICTMENT against Joe Simpson and Amanda Reed, heard by Judge *C. M. Cooke* and a jury, at August Term, 1903, of the Superior Court of UNION County. From a verdict of guilty as to Simpson and judgment thereon he appealed.

Robert D. Gilmer, Attorney-General, and *Redwine & Stack*, for the State.

R. W. Lemmond, for the defendant.

CONNOR, J. The defendant appellant was, together with Amanda Reed, charged with fornication and adultery. From

the judgment of the Court, following a conviction, he prosecutes this appeal and assigns errors in the rulings of his Honor.

Exception 1. The defendant took out a warrant before M. L. Flow, a justice of the peace, charging Isaiah Reed, the husband of his co-defendant Amanda, with an assault. He was examined as a witness for the State in the trial before the justice, and upon such examination made certain statements which tended to show habitual illicit intercourse with the *feme* defendant. The justice of the peace (Flow) was introduced by the State upon the trial of this cause and asked in regard to such statements. The defendant objected. Thereupon the Court examined the witness respecting the examination of the defendant. Upon such examination the justice of the peace testified that he informed the defendant that he need not answer any question which would criminate him, and that he made the statement voluntarily. His Honor overruled the defendant's objection, and to this ruling and the answers to the qeustions asked the witness the defendant excepted. The answers tended to show admissions by the defendant of habitual criminal intercourse with his co-defendant. The exception cannot be sustained.

This Court has uniformly held that testimony given by a defendant, when examined as a witness at his own request, is admissible against him on another hearing or trial for the same or any other offense. Such admissions and declarations do not come within either the language or the reason of section 1145 of The Code. *State v. Ellis,* 97 N. C., 447. Certainly when the defendant goes upon the stand as the prosecutor in an investigation being had upon a warrant sworn out by himself he cannot claim such indemnity as a defendant who is examined under the provisions of section 1145. If, however, there were any force in the exception for the reason assigned it is met by the fact that he was notified that he

need not give in testimony tending to criminate himself. While it was not necessary that his Honor should find the fact that the declarations were voluntary, we think that such is the reasonable construction of the record. The justice was examined at some length upon this point, and thereupon the defendant's objection was overruled. *State v. Efler,* 85 N. C., 585.

Exception 2. The defendant was upon trial before J. A. Clontz, a justice of the peace, upon a charge of burglary, and was sworn as a witness in his own behalf. The justice was asked whether the defendant was notified that he need not testify to any facts tending to criminate him, and answered in the affirmative, saying: "He made this statement voluntarily in his own defense to show the cause of his being in there that night." The testimony was taken down according to agreement between counsel. His Honor admitted the written testimony signed by the defendant, to which he excepted. We are of the opinion that his Honor's ruling in this respect was correct. The defendant testified in his own behalf, as he was entitled to do by section 1353 of The Code, and his testimony taken in writing and signed by him is clearly admissible against him. *State v. Ellis, supra.* In this respect this case is distinguished from *State v. Parker,* 132 N. C., 1014. *Mr. Justice Walker* in that case clearly says that the examination of the defendant was had pursuant to section 1145, and that the simple statement that the witness "was cautioned" was not sufficient to enable the Court to find that the provisions of the section for the protection of the defendant were complied with. In this case it is stated that the defendant, "being duly sworn, testified, etc." It appears that he was represented by counsel before the justice of the peace, and we must assume that appropriate language is used to describe what was done. The fact also appears that he was expressly notified that he need not testify to incriminating

facts. The exception cannot be sustained. This ruling disposes of the fifth exception.

His Honor instructed the jury that there was no evidence proper to be considered by them against the *feme* defendant, and submitted the question of the guilt or innocence of the male defendant under proper instructions. The defendant did not ask for any special instructions. After verdict of guilty he made a motion in arrest of judgment. In this Court the defendant's counsel contended that for this offense, upon the acquittal of one of the defendants, no judgment can be rendered against the one convicted. This was decided in *State v. Mainor,* 28 N. C., 340, and was held as law in this State until doubted in the opinion of *Mr. Justice Davis,* in *State v. Rhinehardt,* 106 N. C., 787. The question came before the Court again in *State v. Cutshall,* 109 N. C., 764, 26 Am. St. Rep., 599, when it was held that an acquittal of one defendant did not work the same result as to the other or prevent the Court from rendering judgment. This result, when first suggested, seems illogical, but for the reasons given in Cutshall's case, and upon the authorities cited, we think it is correct. It is evident that under the peculiar and yet proper provision in section 1041 of The Code the admissions of a defendant, while competent against the one making them, are not competent against the other; a case may, as in this record, be fully made out against one and not against the other. *State v. Ballard,* 79 N. C., 627. A verdict based upon such testimony would, as to the defendant not affected by the admissions, practically be "not proved." The action of his Honor in this case was based upon this principle. He simply decided that there was no evidence against the *feme* defendant. *State v. Lawson,* 123 N. C., 744, 68 Am. St. Rep., 844. It would work a strange result if, as in this case, the male defendant could openly admit habitual illicit intercourse with a woman, and defy the law because there was no competent evidence

against her. We concur in the observations of *Davis, J.*, in Reinhardt's case, *supra,* which were adopted by this Court as the law in Cutshall's case, *supra.* The testimony coming from the male defendant in this case shows a state of lascivious conduct on the part of the *feme* defendant, a married woman, and the male defendant, justifying the very just judgment of his Honor.

No error.

DOUGLAS, J., dissents.

STATE v. McDONALD.

(Filed November 3, 1903.)

EMBEZZLEMENT—*Intent—Burden of Proof—Presumptions—Felonious Intent—The Code, sec. 1014—Reasonable Doubt.*

In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the state to show beyond a reasonable doubt the intent to defraud.

INDICTMENT against C. C. McDonald, heard by Judge *R. B. Peebles* and a jury, at July Term, 1903, of the Superior Court of WAKE County. From a judgment of guilty on a special verdict the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.

Womack & Hayes and *Douglas & Simms,* for the defendant.

WALKER, J. The defendant was indicted in the Court below for the crime of embezzlement and having been convicted appealed to this Court. It is alleged in the indictment that

he was the agent of the Supreme Lodge of Knights of Honor, and that he did fraudulently, corruptly and feloniously embezzle and convert to his own use five hundred dollars, which had been received by him as agent and entrusted to his care for the said Lodge.

By consent of the State and the defendant certain facts were agreed upon for the purpose of being embodied in a special verdict. They were to the effect that defendant had been irregularly appointed Financial Reporter for Oak City Lodge in 1895, and assumed the duties of said office and acted as Reporter until June, 1901. Defendant collected all assessments from the members of the said Lodge and remitted them to the Grand Lodge until May, 1900. In April, 1900, he collected the assessments and deposited them to his individual credit in a bank in Raleigh and drew the money out for his personal use, the amount so drawn out being about twelve hundred dollars. He paid nothing to the Supreme Lodge after April, 1900. In July 1901, with money borrowed from another bank in the said city, he paid back to the members of Oak City Lodge the amount of the assessments collected by him. When asked why he did not send the assessments to the Supreme Lodge, the defendant replied that "he did not remit them because he got in a position that he could not do so." There were other facts agreed upon and stated in the special verdict, but it is not necessary to set them out, as in the view we take of the case those already stated are sufficient to present the point upon which our decision must turn.

There was one disputed question submitted to the jury with the understanding that the finding thereon should be incorporated with the other facts, and that the facts so agreed upon and the said finding of the jury upon the issue submitted to them should constitute the special verdict. That disputed question was: Whether the defendant appropriated the

amount of the assessments collected by him with the intent to defraud the Supreme Lodge. The jury found that he did, and the Court being of opinion that upon the special verdict as thus rendered by the jury the defendant was guilty, the verdict was so entered and judgment rendered thereon, from which the appeal was taken.

Upon the question of intent the defendant requested the Court to give the following instructions: 1. That the felonious intent is an essential element of embezzlement and must be shown by the State beyond a reasonable doubt, and unless the State has so shown the jury will find the defendant not guilty. 2. That the intent with which the offense was committed is for the jury and not for the Court.

These instructions were refused, and the Court charged the jury "That there was an appropriation of the money by the defendant to his own use, and that the law raised the presumption, as a matter of fact, that it was done with a fraudulent intent and put the burden upon the defendant to rebut that presumption; that the defendant might have gone upon the witness stand and said he had no such intent, and then it would have been for the jury to say whether they believed the statement or not; but that the defendant had introduced no evidence and hence he had failed to rebut the presumption before mentioned, and if the jury believe the evidence they should answer yes to the issue."

We think the Court erred in not giving the instructions asked by defendant, and also in charging the jury that the defendant had introduced no evidence and hence he had failed to rebut the presumption of a fraudulent intent raised by the law from the act of conversion of the funds, and that if the jury believed the evidence they should answer the first issue "Yes." It is admitted in the record that at the time the defendant agreed to the other facts in the special verdict his counsel stated that he did not waive the full benefit of the

prayers for instructions above mentioned, and that he would insist on all of his legal right as to the special issue submitted, and the rights of the defendant were accordingly reserved.

The crime of embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner. Embezzlement was not a common law offense. *State v. Hill,* 91 N. C., 561. It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed in them. 1 McLain Cr. Law, sec. 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use could not be convicted of larceny on the ground that the money had never been in the employer's possession. Clark's Cr. Law, p. 308. It was made a crime in this State by The Code, sec. 1014. The general object of these statutes was to punish the misappropriation of property rightfully in the possession of the alleged wrong-doer, who, though civilly liable for a conversion, could not be convicted of larceny, because there was no taking from the owner's possession by an act of trespass. The only difference, therefore, between larceny and embezzlement is that in the former there must be a trespass, while in the latter that is not necessary. Embezzlement is to all intents and purposes larceny without the ingredient of a trespass. In both offences the act of taking or converting must be done with a fraudulent or felonious intent. In embezzlement there must have been not only a relation of trust and confidence between the owner and the person who is charged with the conversion, but the property must have been appropriated with a fraudulent purpose. Clark's Criminal Law, secs. 99 and 100. We think, therefore, that the conversion of funds by a person who has been entrusted with

them becomes criminal as an embezzlement only by reason of this corrupt intent, and it is as necessary for the State to establish the intent as a fact independent of the conversion as it is to prove the bad intent in a prosecution for larceny as a fact apart from the taking. The intent to defraud is no more implied in a case of embezzlement than the felonious intent is from the act of taking in a case of larceny. There is a perfect analogy between the two offences in all respects, except that in one of them a trespass, either actual or constructive, must have been committed, which is not required in the other, its place being supplied by the relation of trust and confidence between the parties; and as this difference has nothing to do with the question of intent, there is no good reason why proof of the intent in the one case should not be governed by the same principles as in the other, for where there is the same reason there is necessarily the same law. It follows, therefore, from what we have said that if the mere act of takink will not raise the presumption of a felonious intent in a prosecution for larceny, there can be no valid reason why the act of conversion should do so in the trial of an indictment for embezzlement. 3 Rice on Ev., sec. 458; 1 McLain Cr. Law, sec. 623; Underhill on Crim. Ev., sec. 282; *State v. McLean,* 121 N. C., 595, 42 L. R. A., 721.

The rule of law, with some exceptions, which do not apply to our case is this: That when an act is forbidden by law to be done, the intent to do the act is the criminal intent and the law presumes the intent from the commission of the act; but when an act becomes criminal only by reason of the intent, unless the intent is proved the offense is not proved, and this intent must be found by the jury as a fact from the evidence. It is for them to infer it, and not for the Court. *State v. King,* 86 N. C., 603; *State v. Wolf,* 122 N. C., 1079; *State v. Barrett,* 123 N. C., 753; *State v. Kittelle,* 110 N. C., 560, 28 Am. St. Rep., 698, 15 L. R. A., 694; *State v. McLean,*

supra. The jury can be instructed to find the particular intent only when the act itself is unlawful and voluntary, because, if it is so, the law itself infers the *quo animo* from the act. *State v. Presnell,* 34 N. C., 103. In that case the criminal intent is inseparably connected with the act which is forbidden by law. *State v. Voight,* 90 N. C., 741. No so when the intent is an essential element of the crime. In *State v. Wolf, supra,* which was an indictment for forgery, an offense involving a fraudulent intent, this Court held that there was error in the charge to the jury because the intent was not left to them to pass upon, although the facts in evidence tended most strongly and conclusively to show the corrupt motive. In *State v. Foust,* 114 N. C., 842, it was said by the Court, through the present *Chief Justice,* that the offense of embezzlement is a breach of trust by misapplying or converting property entrusted to the defendant, when done with a fraudulent intent. This shows clearly that the mere act of converting the property to the defendant's own use is not sufficient to constitute the offense, and that it is incumbent upon the State to go a step farther and prove that it was done with a fraudulent purpose.

Mr. Bishop in discussing the question says, substantially: "The doctrines stated on the general subject of the intent govern the offense of embezzlement, the felonious or otherwise fraudulent intent being an essential element of the crime." 2 Bishop Cr. Law, (8 Ed.), sec. 379. He thus sums up the doctrines to which he had just referred: There can be no crime without an evil mind. No people in any age would allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is this wrongful intent, without which it cannot exist, and it is the doctrine of the law, superior to all other doctrines, because first in nature, from which the law itself proceeds,

that no man is to be punished as a criminal unless his intent is wrong. 1 Bish. Cr. Law, secs. 287-290. In the case of *State v. Reilly,* 4 Mo. App., 398, instructions having been asked by the defendant, which were similar to those requested in this case, and having been refused, and the Court having charged the jury, as did the Judge below in our case, that the act of conversion must have been accompanied with a felonious intent, which was defined by the Court below to be merely a wrongful conversion, the reviewing Court in passing upon the charge said: "The defendant's instruction ought to have been given. It was his right to have the question of intent squarely placed before the jury. Upon refusal to do this in the form requested by the defendant, it was the duty of the Court to present it in some terms sufficiently explicit to avoid any ambiguity or uncertainty. This was not done in the instruction given. The jury were told that in order to a conviction the act must have been done "feloniously." But to this qualifying term was appended a definition which unfairly enlarged its signification. A wrongful act is not necessarily felonious. It is wrong for a man to avoid the payment of his debts, to hold a possession adversely to the true owner or to do any one of many other acts to which no idea of crime ever attaches. A wilful homicide, if wrongful, must from the very nature of the act be felonious in the common law sense. But when we are dealing with the offense of embezzlement, wherein the constituents of crime and those of a mere breach of civil obligation are so easily confused and so difficult to separate, it is exceedingly unsafe to tell a jury, in effect, that they may consider every wrong-doing in that connection as the equivalent of a felony." In a case the facts of which were in substance identical with those in the one at bar the very question now under discussion was passed upon by a Court of exceptional learning and ability, *Cooley, C. J.,* taking part in the decision. In that case the Court

said: "The respondent was treasurer of a Cigar Makers Protective Union, and as such received dues to the amount of one hundred dollars, which he failed to account for and admitted that he had used. He offered to pay it to the Union in installments, but was prosecuted for embezzlement: *Held,* that supposing the case to come within the statute, the prosecution could not be sustained unless the respondent had an intent to convert the property to his own use, and that the question of intent was one of fact for the jury. The trial Judge instructed the jury that if they were satisfied beyond a reasonable doubt that the respondent was treasurer and received the money and spent it, then he was guilty under the information. This was too broad. The respondent might have done this, under some circumstances, with entire integrity of purpose, and might perhaps have been expected by the Union to do so, if he were a man of known responsibility; and the jury should have had all the facts submitted to their judgment upon this question of intent." *People v. Galland,* 55 Mich., 628. See also *People v. Hurst,* 62 Mich., 276; *Bealty v. State,* 82 Ind., 228. There is no need of multiplying authorities to show the application of the general principle to the facts of our case. If we keep clearly in mind the distinction between those cases on the one hand in which the intent is presumed because it is inseparable from the act, the intent to do the act being the criminal intent, or in which the intent is presumed because of the maxim which runs through the whole law, especially the criminal part of it, that every person must be taken to intend that which is an immediate and natural consequence of his deliberate act, *State v. Phifer,* 90 N. C., 721, and those cases on the other hand in which the act is punishable because of the intent with which it is done, we will not find it difficult to conclude that embezzlement falls within the latter class, and that the burden to disprove the intent is not upon the defendant, as the jury were instructed

in this case, but that the State must prove the intent, as any other fact in order to a conviction. The law does not punish the conversion of the money, but the fraudulent conversion. The Court therefore erred in telling the jury that the appropriation of the money alone raised the presumption of a fraudulent intent, and that as the defendant had introduced no evidence, he had failed to rebut this presumption, and further, that if they believed the evidence they should give their verdict against the defendant. The Court on the contrary should have instructed the jury that the burden was upon the State to prove the intent to their satisfaction, excluding every reasonable doubt, and that in passing upon the question they should consider all the facts and circumstances of the case and draw their inferences as to the true intent of the defendant therefrom.

The defendant moved in arrest of judgment upon the ground that the indictment is defective in that it does not follow the language of the statute, which excepts apprentices from its operation. It is not necessary that we should pass upon this motion, as the case goes back for another trial, and the solicitor can send another bill and cure the alleged defect. This practice has heretofore been adopted in such cases, and without intimating whether or not there is a defect in the indictment we suggest the course indicated as the proper one under the circumstances.

There was error in the respects above pointed out, and for this reason the verdict must be set aside and a new trial awarded. It will be so certified.

New trial.

STATE v. NEAL.

(Filed November 24, 1903.)

INTOXICATING LIQUORS—*Druggists—Agency—The Code, sec. 3137—Licenses.*

Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk.

INDICTMENT against A. W. Neal, heard by Judge *T. J. Shaw* and a jury, at January Term, 1903, of the Superior Court of CABARRUS County. From a verdict of guilty and judgment thereon, at May Term, 1903, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Montgomery & Crowell, for the defendant.

CONNOR, J. The defendant was indicted in two counts: First, for selling liquor by the small measure, having no license therefor; second, for selling one pint of liquor, "then and there being a druggist, and said spirituous liquor not being sold strictly for medical purposes and not upon a *bona fide* prescription of a legally practicing physcian. Upon a plea of not guilty the State introduced evidence tending to show that the defendant was the owner of a drug store in said county, and that one Gale, who was the clerk of the defendant, sold to the party named in the indictment one pint of whiskey, and that defendant was present when the whiskey was sold. The defendant introduced evidence tending to show that he had the license prescribed by law to sell liquor as a druggist; that Gale, who was his clerk, was a licensed and registered pharmacist, according to the laws of the State; that

he was not present when Gale sold the liquor and knew nothing about said sale; that he had in good faith expressly instructed and ordered his said clerk not to sell any whiskey or intoxicating liquor contrary to law. It was in evidence that defendant kept whiskey for sale as a medicine only. The defendant asked the Court to instruct the jury that if Gale, the clerk, sold the whiskey to the State's witness without defendant's knowledge, in his absence and against his wishes, they should acquit him. The Court declined to so instruct, and charged the jury that if they were fully satisfied that the defendant owned the drug store and whiskey, and that his clerk (Gale) sold the whiskey to the witness in measure less than a quart, that it was their duty to convict the defendant, although they found that it was sold in the absence of the defendant, against his consent and contrary to his orders. Defendant excepted and from a judgment following a conviction appealed.

The defendant's counsel contend that the facts in this case distinguish it from *State v. Kittelle,* 110 N. C., 560, 28 Am. St. Rep., 698, 15 L. R. A., 694. It was held in that case that a licensed retail liquor dealer is criminally responsible for the unlawful sale by his agent of liquor to minors, although such sale may have been against his instructions and without his knowledge. The decision was put largely upon the fact that the defendant was entrusted with the privilege and authorized to retail liquor because of the fact that he had made it to appear to the Board of Commissioners that he was a fit person—possessed the qualifications—a good moral character, involving discretion and purpose to obey the law; that he could not, without liability, depute some other person to perform this duty. It was further noticed that the statute made the act of selling directly or indirectly to an infant indictable, and the sale to an infant was made *prima facie* evidence of knowledge. The case was well considered, ex-

haustive opinions having been filed by two of the justices, and a dissenting opinion by *Mr. Justice Shepherd.* We think that this case is to be distinguished, and it is therefore unnecessary to review the variant opinions of the learned Justices in that case. The statute, The Code, sec. 3137, makes it unlawful for any person, unless he be a registered pharmacist, to be employed in dispensing or compounding medicines, etc. The business in which the defendant was engaged was not selling liquor—he never placed any liquor in the hands of his clerk to *sell,* except upon a prescription of a regular physician. He was compelled by law to employ for this purpose only those whom the duly appointed agency had licensed and permitted to register. He was not expected or permitted to conduct his business by any other agency. Having, as the evidence tended to show and his Honor's instruction assumed, acted strictly in compliance with the law, both in the selection of his clerk and instructions given him, it would seem that a violation of duty by such clerk would not make him criminally liable. There must be a distinction between the case of a retail liquor dealer who places the liquor in the charge of his clerk for the purpose of selling as a beverage and the owner of a drug store who places it in charge of a licensed pharmacist to sell only as a medicine upon the prescription of a physician. Such distinction is recognized by the Supreme Court of Massachusetts in *Commonwealth v. Joselyn,* 158 Mass., 482, 21 L. R. A., 449, in which it is held "That a retail druggist holding a license, who in good faith intends that liquor shall not be sold to minors, and instructs his clerks accordingly and uses reasonable diligence in the selection of his clerks and in securing obedience to his instructions, is not criminally responsible for the act of a clerk in selling intoxicating liquor to a minor, whether such clerk makes an honest mistake or wilfully disobeys his employer's orders." In so far as this language applies to this indict-

ment—sale of liquor without license—we approve and adopt it. We confine it strictly within this limit. We are not dealing with an alleged violation of our minor liquor law: if it should be made to appear that the employer kept a clerk in his employment, after knowing or having reasonable cause to think that he was violating the law, it would be competent and very cogent evidence that he was not acting in good faith and render him guilty. The principle upon which this decision is made extends no further than its application to the facts in this and like cases. The defendant was entitled to have the jury given the instruction requested. If they found the fact to be as assumed by the instruction the defendant was entitled to an acquittal. Of course the clerk making the sale is guilty.

There must be a
New trial.

STATE v. TYSON.

(Filed November 24, 1903.)

1. ARGUMENTS OF COUNSEL. *Exceptions and objections—Trial—Appeal.*

An exception to the remarks of counsel made during the argument must be taken before verdict.

2. EVIDENCE—*Sufficiency of Evidence—Exceptions and Objections—Appeal.*

Where there is no exception to the sufficiency of the evidence and the evidence is not set out in the record, the sufficiency thereof will not be considered on appeal.

MONTGOMERY and DOUGLAS, JJ., dissenting.

INDICTMENT against Simon Tyson, heard by Judge *G. S. Ferguson* and a jury, at January Term, 1903, of the Supe-

rior Court of PITT County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Skinner & Whedbee, for the defendant.

WALKER, J. The defendant was indicted for burning a tobacco barn and pack-house, and having been convicted appealed to this Court. The only exception relates to certain remarks of the Solicitor in his address to the jury. It was in evidence that the defendant is a colored man and had been a slave of a Mr. Tyson. He was raised on the plantation where the crime was alleged to have been committed and made his home there a greater part of his life. The prosecutor had purchased the plantation and the defendant had been his tenant. The barn which was burned was within forty or fifty yards of the Tyson dwelling, where the prosecutor lived. It was further in evidence that the defendant received a pension as a Union soldier. It is stated in the case that "Counsel for the defendant in addressing the jury spoke at some length and with considerable feeling of the attachment of the defendant to his old master and the members of his family, and pictured with eloquence the sacredness of the surroundings, and argued that the defendant could not and would not in sight of the old dwelling set fire to the barn." The solicitor in reply said: "It did not appear that he (the defendant) was strongly attached to his old master and his family, as it appeared that when the test came he had a gun in his hand ready to shoot down his young master, and is now drawing a pension for it."

No exception was taken to the remarks of the Solicitor at the time, nor were they called to the attention of the Judge until after verdict.

We think that this exception came too late, even if the language of the solicitor in argument was, under the facts and

circumstances of the case, such an abuse of his privilege as to entitle the defendant to a new trial, if exception had been taken at the proper time. The evidence upon which the remarks of the defendant's counsel and the solicitor were based was altogether irrelevant to the issue joined between the State and the defendant, and if it had been objected to in apt time it should, and no doubt would, have been excluded by the Court, but it seems that the defendant's counsel first introduced irrelevant testimony for the purpose of using it as a foundation of his appeal to the jury that the defendant's supposed attachment to his former master and to the old homestead would deter him from committing the crime with which he was charged, and without any objection from the defendant the solicitor was permitted to prove that the defendant was drawing a pension as a Union soldier, and to argue from that fact that he had no such attachment, as he had taken up arms against his master and was drawing a pension for it. It appears, therefore, that the discussion of this evidence proceeded with the consent or acquiescence of the defendant, and that what was said by the solicitor was somewhat provoked if not justified by the previous remarks of the defendant's counsel. The remarks on both sides were of such a character that the presiding Judge could, with perfect propriety and in the exercise of his discretion, have interfered and stopped the discussion, but the defendant is not in a position to complain of what was done or of what the Judge failed to do, as he did not except when he had the right and opportunity to do so, and he did not request the Judge in his charge to call the matter to the attention of the jury, so that any injurious impression made upon them by the remarks of the solicitor might be removed.

This Court has many times decided that exception to the remarks of counsel during the argument must taken before

verdict, and we are not disposed to reverse or even to modify this just and salutary rule of practice.

In *State v. Suggs,* 89 N. C., 527, *Ashe, J.,* speaking for the Court says: "The objection to the remarks was not made until the next day after the verdict was rendered, upon a motion for a new trial. It came too late. It was not made in apt time, and for that reason cannot be entertained, as has been frequently decided by this Court. The party complaining of the 'abuse of privilege' by the opposing counsel should object at the time the objectionable language is used, so that the Court when it comes to charge the jury may correct the error, if one was committed, and put the matter right in the minds of the jury. 'A party cannot be allowed thus to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time, or else be lost.' "

In *State v. Brown,* 100 N. C., 519, the Court, through *Smith, C. J.* (referring to remarks of the Judge alleged to have been prejudicial to the defendant), said: "It is a sufficient answer to the objection that it was not made until after the rendition of the verdict, and repeated adjudications have settled the rule that such exceptions must be taken in apt time and not after a disappointing issue of the trial."

In *State v. Powell,* 106 N. C., 635, the rule is reiterated by the Court in the following language: "The exception to the remarks of the solicitor in his address to the jury is also untenable. The remarks were not objected to, nor was the Court requested to give any instruction in regard to them."

In *State v. Lewis,* 93 N. C., 582, *Ashe, J.,* for the Court, states the rule in language peculiarly appropriate to this case, as follows: "The defendant can take no advantage from his exception taken to the alleged abuse of privilege in the remarks made by the solicitor in his argument before the jury.

For assuming them to be improper, there is no error to be imputed to the Judge in not stopping the solicitor, unless they were objected to, or the attention of the Judge called to them at the time. This does not appear to have been done in this case, and the objection was lost"; and again, in *State v. Speaks,* 94 N. C., 876, he says: "The last exception taken by the prisoner, to the abuse of privilege by the solicitor in his argument to the jury, was only taken after verdict, and it has been repeatedly decided by this Court that such an exception taken after verdict is too late and cannot be sustained."

In *Knight v. Houghtalling,* 85 N. C., 17, cited and approved in *Horah v. Knox,* 87 N. C., 487, *Ruffin, J.,* for the Court says: "It does not appear to us that they (counsel for the plaintiff) either abused the privilege reserved or improperly resorted to any other in connection with the letter in question. But if they had done so we should still be constrained to hold that the plaintiff's objection comes too late."

These extracts from the cases have been made for the purpose of showing that by a long and unbroken line of judicial decisions the rule requiring exception to improper remarks of counsel to be made in apt time and at least before verdict, has been well established. See also *State v. Underwood,* 77 N. C., 502; *Holly v. Holly,* 94 N. C., 99; *State v. Tuton,* 131 N. C., 701; *Goodman v. Sapp,* 102 N. C., 477; *Cawfield v. Railroad,* 111 N. C., 597; *Byrd v. Hudson,* 113 N. C., 212; *Pearson v. Crawford,* 116 N. C., 756; *State v. Surles,* 117 N. C., 720; *State v. Craine,* 120 N. C., 601; *Perry v. Railroad,* 128 N. C., 471. The rule is also clearly recognized in *McLamb v. Railroad,* 122 N. C., 862, and in *Hopkins v. Hopkins,* 132 N. C., 27.

The defendant's counsel in this Court contended, though, than when the abuse of the solicitor's privilege in debate is gross and manifestly calculated to prejudice the defendant, the Judge should interfere and stop counsel and so caution the

jury as to prevent any injurious consequences to the defendant, and his failure to do so even without objection by the defendant was error, and for this position he relied on *State v. Smith,* 75 N. C., 306, and *State v. Noland,* 85 N. C., 576. In *State v. Noland* the defendant's counsel did except in apt time and there was no response from the Judge, but the State's counsel was permitted to continue his abuse of the jurors who were then in the box. This Court held that the error of the Judge in not interfering instantly in such a case could not be cured in the charge. The Judge failed to act when he was called upon to act, and for this reason the case is not in point. It also appears by clear inference from the statement of the facts in *State v. Smith* that exception to the objectionable remarks was taken at the proper time, but if the cases cited by the defendant's counsel sustained his position we could not follow them and disregard, if not overrule, the many and more recent cases by which a different rule is established.

The question now under consideration was before this Court in *Perry v. Railroad,* 128 N. C., 471, in which it appeared that the counsel for the plaintiff, in his address to the jury, related facts within his personal knowledge, of which there was no evidence in the case, and made those facts the basis of an attack upon the defendant's witnesses, in which he strongly insinuated that they had been guilty of perjury. "These facts" (says *Douglas, J.,* speaking for the Court) "were essentially damaging in their nature, and, coming from so high a source, were capable of producing most dangerous prejudice." In passing upon the exception of the defendant to the said remarks of counsel, the question arose whether objection to them had been sufficiently made and in apt time, and in this connection the Court says: "The exception does not appear to have been taken in a very regular manner; but as his Honor has allowed it, evidently for the purpose of giving the defendant the fullest opportunity of appeal, we will examine it in

the spirit in which it was allowed." It is to be fairly deduced from the case of *Perry v. Railroad, supra*, that the Court will not grant a new trial because of abusive language of counsel in argument, even though it can be clearly seen that a party has been prejudiced, unless exception is taken in apt time or at least before the case is given to the jury. There is no more reason for awarding a new trial when counsel indulge in the use of abusive language or improper comments calculated to prejudice one of the parties, unless exception is taken at the proper time, than there would be for permitting a party to except after verdict to evidence which would have been excluded if objection had been made in apt time. Evidence thus admitted, without objection, may be just as damaging to the party in its influence upon the jury as the improper remarks of counsel, and sometimes more so, but no rule is better settled than the one under which an objection to evidence is deemed to be waived if brought forward for the first time after verdict.

We conclude, therefore, that the conduct of a trial in the Court below, including the argument of counsel, must be left largely to the control and direction of the presiding Judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly abuse their privilege at any time in the course of the trial the presiding Judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the Judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party who alleges that he has been injured to a new trial. Before that result can follow

the Judge's inaction, objection must be entered at least before verdict. *Knight v. Houghtalling, supra.* A party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as a tacit admission that at the time he thought he was suffering no harm, but was perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when by every consideration of fairness he should be silent. We will not give him two chances. The law helps those who are vigilant—not those who sleep upon their rights. He who would save his rights must be prompt in asserting them.

What was said by this Court in *Burton v. Railroad,* 84 N. C., 192, related to the charge of the Court to the jury, and in such a case exception can always be taken after verdict. If the Court lays down the law improperly the matter can be reviewed in this Court if there is an assignment of the error even in the case on appeal. The remarks of the Court in that case had special reference to an objection made to evidence which was competent for one purpose but not for another. There was a general objection to the evidence, but the Court failed to confine it to its proper and legitimate purpose. In this connection the Court said, at page 195: "It is error to admit evidence competent for one purpose only, to be considered and acted on for another and improper purpose. The error lies not only in the omission to make the necessary explanation, but in giving a direction calculated to mislead, and which may have misled, the juty in rendering their verdict. This is so connected with the facts allowed to be proved

as to extend the exception to the reception of the testimony to the disposition afterwards made of it."

It is suggested that the evidence was not sufficient to justify a conviction of the defendant. There is no point made in the record as to whether there was any evidence, or any sufficient in law, upon which to base the verdict. Whether there was or not is a question not now before us. The record does not contain any of the evidence, because no question was made in regard to it, and the fact that there is no statement of the evidence in the record is tantamount to an admission that there was evidence sufficient to sustain the verdict. In this Court we are confined to the record and have no right to receive information of any facts that do not appear in it, much less to consider or act upon any such information. "The record importeth verity," and we are enjoined by the law to look to the record alone and upon it to found our judgments. Any other rule would render insecure the important rights upon which we have to pass.

It is needless to discuss the question whether, if seasonable objection had been made by the defendant in this case, the remarks of the solicitor, in view of the particular circumstances under which they were made, were of such a character as to entitle the defendant to another trial. *State v. Bryan,* 89 N. C., 534.

The defendant's objection to the formation of the grand jury was, we think, properly abandoned in this Court. We find no error in the rulings of the Court or in the record, and it will be so certified.

No error.

MONTGOMERY, J., *dissenting.* The question raised by the exception in the defendant's appeal is one of practice, pure and simple, for from my point of view the remarks of the solicitor constituted a *gross* abuse of privilege, to the mani-

fest prejudice of the defendant. Whether or not the language was an abuse of privilege and prejudicial to the defendant is not decided in the opinion of the Court. The opinion stops at the point where it is declared that the objection was made too late—after the trial. It is the general rule, no doubt, that objection to the course of counsel during the trial must be made at the time, and before verdict, and many of the authorities cited by the Court to sustain that view are fully in point. But to my mind there must be an exception to the rule, or the ends of justice be entirely perverted in occasional instances. I think the exception to the rule is that where the abuse of privilege is *gross* and the prejudice to the opposite party manifest it is the *duty* of the Court then and there to stop counsel, *ex mero motu*. This view of an exception to the general rule seems to me to be sustained by the clear precedents of this Court. In *Jenkins v. Ore Co.*, 65 N. C., 563, *Judge Reade*, for the Court, said: "Zealous advocates are apt to run into improprieties; and it must generally be left to the discretion of the Judge whether it best comports with decency and order to correct the error at the time by stopping or reproving the the counsel or wait until he can set the matter right in his charge. It must often happen that the Judge cannot anticipate that the counsel is going to say anything improper, and it may be said before the Judge can prevent it, as in this case. * * * And the question was whether he was obliged to stop the counsel then and there and reprove him, and tell the jury that they must not consider that, or whether he would wait and correct that and all other errors when he came to charge the jury. Ordinarily this must be left to the discretion of the Judge. But still it may be laid down as law and not merely discretionary, that where the counsel *grossly* abuses his privilege, to the manifest prejudice of the opposite party, it is the *duty* of the Judge to stop him then and there,

and if he fails to do so and the impropriety is gross, it is good ground for a new trial."

In *State v. Williams,* 65 N. C., 505, the same Judge said: "It (power to stop counsel in the abuse of privilege) is a power which is usually exercised sparingly, but nevertheless it is a power which the Court possesses and which ought to be promptly and firmly exercised where the abuse is gross, as was the case here." It is proper for me to add that in the two cases above referred to objection was made at the time the abuse of privilege was alleged, but to my mind the reasoning there is conclusive that whether or not the objection was made, it is nevetheless the *duty* of the Judge to stop counsel then and there when the abuse of privilege is *gross* and to the manifest injury of the opposite party. However that may be, in the cases of *State v. Smith,* 75 N. C., 306, and *State v. Noland,* 85 N. C., 576, it does not appear in the record that objection was made during the trial to the language of counsel. In fact in the last mentioned case it appears that there was no objection as I read the case. The trial there extended through several days, and on the third day the counself assigned for the State charged two jurors with having, through perjury and corruption, gotten upon the jury for the purpose of acquitting the accused, read various affidavits to establish the charge and made violent speeches in the hearing of the whole jury. The Court declined the motion of the counsel to make a mistrial by withdrawing a juror, on the ground that the affidavits were hearsay in their nature. On the next day counsel renewed the motion for a new trial, amended so as to charge that a certain one of the jurors had not only formed and expressed the opinion that the prisoners were not guilty, but that he had used his best efforts to influence others to adopt the same opinion. In arguing the motion the second time the case states that the counsel for the prosecution were more impassioned in their utterances and

abusive of the jury than on the day previous. The contemptuous treatment of a certain one of the jurors by counsel for the State in his closing address to the jury was as marked as it is possible to conceive of as having occurred in a court of justice. It does not appear from the record in that case that any objection was made to the course of counsel for the prosecution on the fourth day of the trial—the day on which the particular juryman was so grossly outraged. *Judge Ruffin,* who delivered the opinion of the Court in that case, said: "It is not possible that the law can give its sanction to a proceeding conducted with so little regard to regularity and decorum, as was the trial of the prisoner in this case. Neither would it permit a verdict to stand and the sentence under it to be executed, which has been rendered under such stress of force and dictation as was brought to bear upon two of the twelve jurors employed, and especially upon the juror James. To secure for the administration of the law that general respect and confidence which it is the highest public interest it should enjoy, it is absolutely essential that the business of the Court should be conducted with becoming gravity and dignity, that their judgments should be seen to be temperately considered and impartially delivered; and above all, that the verdict of the juries concerned should be known to be the result of serious convictions and free deliberations. Appreciating this great necessity, extending alike to the public interests and the individual security, our Courts have been constant in the purpose to protect the juries of the country from the approach of every circumstance which might tend unnecessarily to excite their minds or influence their prejudices." The Court, after further reciting the treatment which the juror James had received from the counsel, further said: "After its commission under the circumstances it admitted of no cure by anything that would be said in the charge. The subjection of the mind of the juror, his loss of self-respect and his apprehension of

responsibility to public opinion could not be believed." As we have said, it does not appear from the record in the case of *State v. Smith, supra,* that objection was made to the course of counsel during the trial, and in that case an extract is made from the decision in the case of *Jenkins v. Ore Co., supra,* in these words: "When the counsel grossly abuses his privilege to the manifest prejudice of the opposite party it is the *duty* of the Judge to stop him, there and then. If he fails to do so and the impropriety is gross it is good ground for a new trial."

If I should be in error in my analyses of those cases it is yet true that the question decided in this case is one of practice, and that being so it can be modified or altered by this Court without injury to any vested right of property, and at the same time protection of personal liberty; and this case demonstrates, in my opinion, the necessity of a change in our practice on this question, if my view is not now that of the law. Under all the circumstances of time, place and conditions the defendant's case could not have been impartially considered by the jury after the solicitor's speech. As far as the personal and official influence of the solicitor extended, the helpless old man was placed before the jury in the light of a slave, who had not only rebelled against the lawful authority of his owner, but had taken arms in his hands and joined the common enemy to shoot down a member of his old master's household, and who was for that act the recipient of a reward in the way of a pension from the conqueror. The solicitor must have known when he introduced the evidence that the defendant had been a Union soldier, and then was drawing a pension, that it was totally incompetent on an indictment for crime against the State, and that it was as damaging evidence under all the conditions of time and place as could have possibly been given in. That its use before the jury had a strong influence in exciting their prejudices can-

not be doubted, it seems to me. In my opinion it was one of those cases where, under the circumstances, the injury done could not have been cured by anything that could have been said by the Court. And to conclude, if I am in error in my view as to what is the true rule of practice on the point raised on this appeal, and the true rule is that stated in the opinion of the Court, I ask the question put in *Burton v. Railroad,* 84 N. C., 192: "Is the Court, in the observance of a strict rule of practice, compelled to shut its eyes to the injustice done the prisoner and affirm a judgment which wrongfully takes his life?" The sentence in the case before us can well be regarded as a death sentence, for the defendant is seventy-six years old, and the judgment of the Court is a term of eight years in the State Prison. I cannot hesitate to break the rule of practice, if the true rule is stated in the opinion of the Court, which entails such a perversion of justice. I think there should be a new trial.

DOUGLAS, J., *dissenting.* I deeply regret being compelled to dissent in this case, and especially upon the grounds that I am forced to assign; but I would feel unworthy of the blood I bear and the associations of my early manhood, were I to admit that anywhere, or at any time, the fact that a man was a Union soldier is any reason why he should be convicted of felony. The essential facts of the record are thus succinctly stated in the opinion of the Court: "The defendant was indicted for burning a tobacco barn and pack-house, and having been convicted, appealed to this Court. The only exception relates to certain remarks of the solicitor in his address to the jury. It was in evidence that the defendant is a colored man and had been a slave of a Mr. Tyson. He was raised on the plantation where the crime was alleged to have been committed, and made his home there a greater part of his life. The prosecutor had purchased the plantation and the

defendant had been his tenant. The barn which was burned was within forty or fifty yards of the Tyson dwelling, where the prosecutor lived. It was further in evidence that the defendant received a pension as a Union soldier. It was stated in the case that 'counsel for the defendant in addressing the jury spoke at some length and with considerable feeling of the attachment of the defendant to his old master and the members of his family, and pictured with eloquence the sacredness of the surroundings, and argued that the defendant could not and would not in sight of the old dwelling set fire to the barn.' The solicitor, in reply, said: 'It did not appear that he (the defendant) was strongly attached to his old master and his family, as it appeared that when the test came he had a gun in his hand ready to shoot down his young master, and is now drawing a pension for it.' "

It was admitted upon the argument that the statement that the defendant "had a gun in his hand ready to shoot down his young master" was a mere figure of speech, and simply meant that he was in the Union army during the late Civil War. There is not a particle of evidence that he ever came near his young master during the war, or that he ever tried or intended to do him the slightest harm. The entire gravamen of the allegation was that he is on the pension roll of the Republic.

This is not a case where there is no exception, but it is said that the exception was not taken in apt time, that is, when the words were uttered. It is true that is the general rule, but like all rules it must admit of necessary exceptions. At best it is a technical rule of procedure founded in convenience and not in natural justice.

As in cases of libel, there are words which are actionable *per se* independent of malice, so in the trial of causes there are methods of argument which are objectionable *per se* regardless of exception. Among such are any words that reflect

upon the integrity of the government or the honor of the flag. I can see how the words might have been uttered by the brilliant young solicitor in the heat of debate, and overlooked by the upright and learned Judge; but can we, sitting here in calm review, give them the sanction of our approval in the face of the exception and after exhaustive argument? Admitting that the exception was not taken in apt time, can we permit a mere technical rule of practice to lie in cold obstruction across the path of justice and of right?

I am not alone in this view in placing justice and humanity above the technical rules of practice. I will cite but one case, *Burton v. Railroad,* 84 N. C., 192, where *Chief Justice Smith,* speaking for a unanimous Court, says on page 196: "We are not prepared to concede the proposition so broadly and strenuously asserted in the argument." * * * "That no error, however palpable and hurtful, committed in the administration of the law by the action of the Judge, are capable of correction unless specially pointed out in an exception on the record." "The rule it self is not without qualification, and enforced, would, in some cases, lead to disastrous consequences. For the purpose of illustration, let us suppose a case on trial, the indisputed facts of which make the prisoner's offense to be manslaughter, and yet, under the erroneous charge of the Judge the jury find a verdict of murder, and all this fully appears on the record. Because of the inadvertence of counsel, the misapprehension of the Judge as to the law and the consequent misdirection given to the jury are not specially pointed out in an exception, and yet the fatal error is apparent to the Court. Is the Court, in the observance of a strict rule of practice, compelled to shut its eyes to the injustice done the prisoner and affirm a judgment which wrongfully takes his life? In such a case would not the Court interfere and correct a manifest error, although overlooked at the trial, and, therefore, not the subject of a distinct exception?"

It is true the defendant is not sentenced to death, but he is sentenced to eight years in the penitentiary, which is equivalent to a life-sentence to a man of seventy-two years of age.

There is in the record no direct evidence whatever of the defendant's guilt, but I am told we must presume there was such evidence. If I am compelled to go outside the record to presume anything, I shall ascertain the truth as far as I can. I am told that practically the only evidence against him was an alleged confession claimed to have been made to a professional negro detective who had given him whiskey to elicit a confession.

It is natural that his counsel should argue to the jury that they should believe the oath of this old man rather than that of an imported negro detective; that standing on the brink of the grave at the threshold of his boyhood's home, with all the sacred memories of the past coming back as they will to those the lengthening shadows of whose lives have almost reached the horizon's edge, he would not commit a useless and wanton crime. On the other hand, the State insisted that the detective's story should be believed in preference to that of the defendant because, forsooth, the latter had been a Union soldier, whose name was on the pension roll of our country. Under such circumstances, can any one suppose that such an argument was either proper or harmless?

Of course men who have been soldiers may commit infamous crimes, but not because they have been soldiers.

In itself the pension roll is a roll of honor, on which any one, whether Union or Confederate, may well be proud to have his name enrolled. No one can have a higher admiration than I for the true Confederate soldier, who, believing that he owed supreme allegiance to his State, freely offered his life in its defense. No one would more readily join in keeping fresh the memory of his heroic deeds, or in extending the generous aid that he may justly ask from a grateful State,

but equal justice must be done to those who followed the flag of our reunited land.

The opinion of the Court says: "In this Court we are confined to the record and have no right to receive information of any facts that do not appear in it, much less to consider or act upon any such information." This is undoubtedly the correct rule governing the opinion of the Court in deciding the case, but has not been followed in dissenting opinions which decide no rights and for which the author alone is responsible.

STATE v. HOLDER.

(Filed December 1, 1903.)

1. INDICTMENTS—*Counts—Verdict—General Verdict.*

Where there is more than one count in a bill of indictment, and there is a general verdict, the verdict is on each count, and if there is a defect in one or more of the counts, the verdict will be imputed to the sound count.

2. VENUE—*Exceptions and Objections—Waiver—Abatement—Plea—The Code, sec. 1194.*

An objection to venue is waived unless taken in apt time by a plea in abatement.

3. LIMITATIONS OF ACTIONS—*Exceptions and Objections—Pleadings—Instructions.*

The statute of limitations, if relied on by the accused, should be specifically brought to the attention of the trial judge by a plea or a request to instruct.

4. INTOXICATING LIQUORS—*Indictment—Licenses.*

In a prosecution for the sale of intoxicating liquors without a license, the indictment should negative the accused having license to sell.

5. EVIDENCE—*Indictment—Intoxicating Liquors.*

Evidence that the accused sold three pints of liquor does not sustain the charge of a sale by a measure less than a quart.

INDICTMENT against Felix Holder, heard by Judge *W. H. Neal* and a jury, at August Term, 1903, of the Superior Court of CABARRUS County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Montgomery & Crowell, for the defendant.

CLARK, C. J. The defendant was indicted jointly with one Sides for selling spirituous liquor without license. The indictment set forth three counts. The first count charges a sale by said Sides and the defendant, "by the small measure, viz., by a measure less than one quart, to-wit, three pints," alleging further that the said Sides had no license to retail. The second count charges a sale by Sides and the defendant, they not being licensed druggists and said spirituous liquor not being sold for medical purposes only and not upon a *bona fide* prescription of a legally practicing physician. The third count charges a sale by said Sides and the defendant of one pint of spirituous liquor, a local election duly authorized by statute having been held, at which total prohibition of the sale of spirituous liquor in said county had been adopted.

The evidence was that the party named as purchaser in the indictment (one Tucker) had bought three pints of whiskey of said Sides, and had then and there paid Holder the price of the whiskey. There was no evidence of co-partnership between Holder and sides. The Court charged the jury that if they found beyond a reasonable doubt that Sides and Holder sold three pints of whiskey to the witness Tucker, it

was their duty to find them guilty, otherwise not guilty. The defendant excepted, and there being a general verdict of guilty appealed from the judgment.

The defendant asked the Court to instruct the jury that there was not sufficient evidence to convict the defendant upon any count in the indictment. The Court refused and the defendant excepted. The State admits there was no evidence on the third count, but it is well settled in this State that where there is more than one count in the indictment, and there is a general verdict, this is a verdict of guilty on each count, and if there is a defect as to one or more counts by reason of any defect therein, or erroneous charge as to said count, or lack of evidence, the verdict will be imputed to the sound count in the indictment, as to which there was no erroneous instruction and upon which evidence is offered. *State v. Toole,* 106 N. C., 736, where the authorities to that effect, which are numerous, are collected. It has since been often cited and approved, *State v. Carter,* 113 N. C., 639; *State v. Edwards, Ibid.,* 654; *State v. Lee,* 114 N. C., 844; *State v. Perry,* 122 N. C., 1020; *State v. Railroad,* 125 N. C., 670; *State v. Peak,* 130 N. C., 712, and in still other cases.

The defendant, however, contends that the charge should have been given because it was not shown that the sale was in the county, nor within two years. But objection to venue is waived unless objection is taken in apt time by plea in abatement. *State v. Lytle,* 117 N. C., 799; *State v. Woodard,* 123 N. C., 710; The Code, sec. 1194. So, if the statute of limitations was relied on, it should have been specifically brought to the attention of the Court by plea or a request to charge, the object being in both cases that if the offense was in fact committed in the county and within two years, the Judge should, upon either being put in issue, allow evidence to be introduced that there should not be a defect in the administration of justice by an inadvertent failure to prove venue or

date, when neither had been questioned. *State v. Patterson,* 74 N. C., 230, in which *Settle, J.,* stated that under the practice in this State the prosecution was not required in the first instance to prove venue, time, etc., but when the matter was put in issue by a request to charge specifically as to those phases the Court might permit the solicitor to recall a witness and prove time, place, etc. This is eminently just, as the purpose of the law is to try criminal as well as civil actions upon their merits, and to ascertain the truth of the matter in controversy. A trial "is not a game of skill in which the object is to catch the Judge (or the other side) 'out on first base' by an inadvertence or error." (*Wilson v. Mfg. Co.,* 120 N. C., 96), which can be corrected at the time if called to the attention of the Court. Hence the decisions of this Court are uniform that an objection that "there is no evidence" cannot be considered unless there is a prayer to so instruct the jury, and thus give opportunity to put in evidence upon the point referred to if it is available but has been merely overlooked. *State v. Williams,* 129 N. C., 582; *State v. Harris,* 120 N. C., 577, and numerous cases there cited, and in Clark's Code (3 Ed.), at pp. 511 and 773. Had the defendant asked an instruction that "there was no evidence that the offense had been committed within the county and within two years," the inadvertence could have been corrected at once by evidence, or, on failure to do so, the Judge could have directed a verdict of not guilty.

The defendant moved in arrest of judgment in this Court because it is not charged that Holder "had no license to sell." This motion must be sustained. It is true that a conviction of Sides (if appealed from) would be sustained by proof that Holder sold as his agent (*State v. Kittelle,* 110 N. C., 564, 28 Am. St. Rep., 698, 15 L. R. A., 694), and that Sides would be none the less guilty because the money was paid to Holder (*State v. Best,* 108 N. C., 747), or any other device

to evade the law was used. *State v. McMinn,* 83 N. C., 668. It is also true that if Sides sold liquor illegally Holder would be guilty if he aided or abetted such illegal act. But if Holder himself had license to sell, his participation in the sale would not be illegal, and the indictment should negative his having license to sell. *State v. Bradley,* 132 N. C., 1060; *State v. Kirkham,* 23 N. C., 386.

The second count is also fatally defective on the same ground, for while it charges that both Holder and Sides, not being druggists, sold spirituous liquor not for medicinal purposes, nor upon prescription, etc., it fails to negative their having license to retail. Approved precedents are so readily accessible it is to be regretted that solicitors should in any case tax the time and patience of Courts with defectively drawn bills of indictments, especially in such matters as this, where indictments are of common occurrence. Nor do we comprehend the charge of a sale "by a measure less than a quart, to-wit, three pints." Only one sale was shown, and the Court should have charged as asked that if the "three pints were sold at one time and in one transaction," it would not sustain the charge of a sale by a measure less than a quart. *State v. Poteat,* 86 N. C., 612, presented an entirely different state of facts, and discusses the distinction.

The third count seems unobjectionable in form, but the State admits that there was no evidence to support that count (*State v. Chambers,* 93 N. C., 604), and that a prayer to so instruct the jury was asked in apt time and refused, and for this, the other counts being defective, there must be a

New trial.

STATE v. LEDFORD.

(Filed December 8, 1903.)

1. INDICTMENT—*Return into Court—Grand Jury.*

The facts in this case show that the bill of indictment was returned in open court.

2. INDICTMENT—*Return into Court—Quashal—Arrest of Judgment—Waiver.*

A defendant waives his right to object that an indictment was not returned in open court when he pleads and moves for a severance before having moved to quash the bill.

3. VENUE—*Abatement—Arrest of Judgment—Removal of Causes—Exceptions and Objections.*

An objection to the venue in that a case had been improperly removed from one county to another must be taken by a plea in abatement, not by a motion in arrest of judgment.

4. REMOVAL OF CAUSES—*Venue.*

The facts as stated in this case do not amount to the removal of a certain criminal case from the county in which the indictment was found.

5. EXCEPTIONS AND OBJECTIONS—*Evidence.*

A general objection to evidence will not be entertained if such evidence consists of several distinct parts, some of which are competent and some not competent.

6. EVIDENCE—*Arson.*

On a prosecution for arson a witness testified that the evening before the night of the burning the children of defendant came to her house and borrowed matches, and that the morning after the fire she stated to defendant that she thought she furnished the matches which burned the barn, whereupon he said that if she thought so not to say anything about it; that witness and the owner of the barn were not friendly; and that about a week before the burning defendant came to witness' house to

get some tobacco, and witness said she had none, and he asked her why she did not get some from the owner of the barn and never pay for it, and stated that the owner was getting rich too fast, and that he had a fine barn, but that it would not stand two years, such evidence was competent.

INDICTMENT against C. R. Ledford, heard by Judge *W. A. Hoke* and a jury, at Fall Term, 1902, of the Superior Court of YANCEY County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
J. S. Adams and *E. J. Justice,* for the defendant.

WALKER, J. The defendant and others were indicted at August Term, 1900, of the Criminal Court of Yancey County for setting fire to and burning a barn, the property of one B. L. Hensley, and on motion of defendant there was a severance as to him. He was tried and convicted at Fall Term, 1902, of the Superior Court of said county (the Criminal Court having in the meantime been abolished), and from the judgment entered upon the verdict he appealed. The defendant assigns three errors which will be considered in the order in which they are presented in the record.

The first error assigned is that it does not appear in the record that the bill of indictment was returned by the grand jury in open Court. It is without doubt necessary that the indictment should be presented in open Court, and the return of the grand jury is made, or is presumed to be made, in Court while it is actually in session, and at no other time. *State v. Collins,* 14 N. C., 121. It appears from the transcript in this case that the Criminal Court of Yancey County opened and organized on the 6th day of August, 1900, the time appointed by law, and that on the minutes is this entry: "The Court having thus organized the following proceedings

were had and done." Then follows the indictment with the endorsement, showing the examination of witnesses under oath before the grand jury and the finding that it was a true bill, which is signed by the foreman. It is then stated that the defendant moved for a severance, and it was ordered by the Court that he be allowed to plead and to be tried separately from his co-defendants. The case was continued and the defendant gave bond for his appearance at the next term. All this appears to have been done without any interruption in the proceedings of the Court from the time of its organization. The case cannot well be distinguished from *State v. Lee,* 80 N. C., 483, in which *Dillard, J.,* at page 485, says: "There can be no doubt that it is necessary that a bill of indictment should be returned by the grand jury into open Court; and we think according to the proper construction and import of the transcript from Bladen Superior Court, the bill against the prisoner was returned as required by law. The transcript, after stating the Court as opened and held on the 8th Monday after the 2d Monday in August, 1878, for the county of Bladen, a *venire facias* returned by the sheriff, a list of persons summoned as jurors, and the drawing and organization of a grand jury therefrom, uses the language: "It is presented in the manner and form following"; and then comes the bill of indictment under which the prisoner was tried. The jury are required to come into Court and make their return, and on coming in for this purpose, they pronounce their return, or are presumed to do so, and the Court records their return, and the record of the return thus pronounced is made by the use of the words: "It is presented in manner and form following." In legal import, the record having stated the Court as open and the grand jury sworn and charged, it is to be taken when the record recites "it is presented," etc., that the Court is sitting, and therefore that the return is made in open Court."

Even if, under the facts and circumstances of this case, the defendant can avail himself of this alleged defect in the record by a motion in arrest of judgment, he having asked to be allowed to plead and for a severance, without moving to quash or making any other preliminary motion, we do not think there is any merit in the exception, and it is disallowed. *State v. McBroom,* 127 N. C., 528.

The defendant next excepted because, as he alleges, the Superior Court of Yancey County had no jurisdiction of the case, the same having been removed for trial by order of the Court to the county of Mitchell and having never been properly remanded to Yancey County, so as to reinvest that Court with jurisdiction. The facts relating to this exception are as follows: It appears from the record that the defendants C. R. Ledford, Will Ledford and Neil Ledford were jointly indicted and that at Spring Term, 1901, upon motion of Will Ledford, the case as to him was removed for trial to Mitchell County. The order of removal was improperly and ambiguously worded, and it did not appear clearly therefrom whether it was made as to Will Ledford alone or as to both Will and C. R. Ledford, and for that reason the Superior Court of Mitchell County, at September Term, 1901, after finding and stating in its order the fact that the case was not removed as to C. R. Ledford but only as to Will Ledford, and that there had been a severance of the trial before the removal, ordered that the "case of C. R. Ledford should remain" in the Superior Court of Yancey County, and should be stated on the docket of that Court by the Clerk and stand for trial at the next term, and the Court then required C. R. Ledford, who was at the bar of the Court, to give surety for his appearance at the next term of Yancey Superior Court, granting him some indulgence so that he could find bail. The Court further required its Clerk to transmit a copy of that order to the Clerk of the Superior Court of

Yancey County with directions to restore the case of *State v. C. R. Ledford* to the docket of the latter Court in accordance with the tenor of the order made in Mitchell Superior Court. It further appears that at Fall Term, 1901, of the Superior Court of Yancey County, in the case of *State v. C. R. Ledford,* the following entry was made on the minutes: "The State suggests the insufficiency of the Mitchell County record removing cause to Yancey. It is ordered that the cause be sent back to Mitchell County for a full and perfect record." The defendant's counsel contended that this order removed the case back to Yancey County. The language of this minute is untechnical, but we take it to mean that the Court, by this order in the nature of a *certiorari,* directed a more perfect transcript of the proceedings in Mitchell County to be certified by the Clerk of that Court to the Superior Court of Yancey County. In the view we take of the case, this order was unnecessary, and even if it was a proper one it could not change our decision. The Superior Court of Yancey County had possession of the original record in the case and could proceed regularly upon it without any more perfect transcript from the Superior Court of Mitchell County.

At April Term, 1902, of the Superior Court of Yancey County, the defendant C. R. Ledford submitted a motion to remove his case for trial to some adjacent county. This motion was denied in the following order of the Court: "This cause coming on to be heard upon the motion of C. R. Ledford to remove this cause to some adjacent county for trial, now, after considering the affidavits filed, the motion to remove is denied. It is ordered that this cause be continued; and it is further ordered that the Clerk of Mitchell County certify a copy of the transcript received by him, together with a transcript of the proceedings had and done in his Court in the case of C. R. Ledford and William Ledford, and produce the same on or before the next term of this Court.

It is the further order of this Court that the Clerk of this Court transmit a copy of this order duly certified under his seal of office to the Clerk of the Superior Court of Mitchell County within the first fifteen days after the adjournment of this Court." The last order explains the one made at Fall Term, 1901, and shows, as we have already construed it, that the latter order merely required to be certified a copy of the proceedings of the Superior Court of Mitchell County, in which Court the record had been corrected so that it would speak the truth and show that the cause had not been removed to that county as to C. R. Ledford.

We have set forth fully the material parts of the record which are necessary to be considered in connection with this exception, and it appears therefrom that as a fact the case of the defendant C. R. Ledford was never removed from Yancey County, and the confusion and uncertainty in the transcript which was sent to the Superior Court of Mitchell County were caused merely by a misprision of the Clerk or some misapprehension on his part as to what had actually been done. This being so, the defendant's objection to the jurisdiction is groundless.

But if the case had been properly removed we do not think the defendant would have had any legal cause to complain. By its order at September Term, 1901, the Superior Court of Mitchell County directed that the case of *State v. C. R. Ledford* be returned to the Superior Court of Yancey County, and that the Clerk of the latter Court reinstate the case on the docket so that it should stand for trial at the next term. The defendant does not object to the order upon the ground that he was thereby given a too speedy trial in the county of Yancey, and if he had made any such objection, it does not appear that he did not have sufficient opportunity to prepare and present his defense, or that he was otherwise prejudiced by the order of the Court, which was manifestly

intended to speed the cause and accelerate the administration of justice. It is recited in that order that the fact of the mistake appearing, and after an intimation of the Court, "counsel for the defendant (C. R. Ledford) stated that they would neither consent nor object to an order returning the case to Yancey County for trial." The defendant was arraigned in the Superior Court of the latter county at Fall Term, 1902, and entered a plea of "not guilty." He then submitted a motion for a removal, which was overruled, and then a motion for continuance, which was denied. He was thereupon tried and convicted. It further appears from the above recital of facts, as taken from the record, that the defendant never objected to the jurisdiction of the Court until after verdict, when he moved in arrest of judgment.

If the case had been regularly removed to the county of Mitchell for trial, we think that Court would have committed an error in making the order that the case be returned to the Superior Court of Yancey County, unless the order had been made by consent of the State and the defendant, or was based upon affidavits and a proper finding of facts by the Court. When a case is removed from one county to another under the statute so as to be regularly constituted in the Superior Court of the latter county, it cannot be remanded by the Court of its own motion to the county from which it was removed (*State v. Swepson,* 80 N. C., 571), but if it is thus irregularly remanded the latter Court may try it if the defendant fails to object in apt time and in the proper way to the Court further proceeding in the cause. It is not a question of jurisdiction upon such a state of facts, but only one of venue. The Superior Court of Yancey County had a general jurisdiction of all offenses within the limits fixed by law, and having this jurisdiction it could proceed in any cause pending in it, as in this case, where the indictment was found in that Court, notwithstanding any irregularity in removing the

case, unless its right to hear and determine the case is in some way challenged by the defendant before verdict. It has been ruled that this must be done by a plea in abatement. *State v. Woodard,* 123 N. C., 710. A defendant cannot, of course, be tried in the Court of a county where no indictment has been found by a grand jury, unless the case has been regularly removed from the Court of another county where such an indictment has been returned; but ours is not that sort of a case, for this prosecution originated in the Superior Court of Yancey County. It is unnecessary to pursue the subject further, as we consider it perfectly clear from our reading of the record that the case was not in fact removed. The exception of the defendant based upon the objection to the jurisdiction cannot, therefore, be sustained. The motion in arrest of judgment was properly overruled.

The State introduced Julia Lewis, who lived near the defendant Ledford, and proposed to prove by her "that the evening before the night that the barn was burned the children of the defendant came to her house and borrowed matches." The defendant objected to this evidence, the objection was sustained and the evidence was excluded. The witness then testified that "The defendant came to her house on the morning after the fire and told her that Back Hensley's (meaning B. S. Hensley's) barn was burned the night before, and that he had seen it burn; that he and his wife and son were coming from their upper place about ten o'olcck at night, and as they passed Back Hensley's they saw the barn burning. To this the witness said she replied: 'I think I furnished the matches that burned it.' The defendant said: "Julia, you don't think that?" The witness said she knew it. The defendant then said: 'If you think that don't say anything about it.' This speech about matches referred to some matches which I had given the defendant's children the evening before." The defendant objected to the above evi-

dence; the objection was overruled, and the defendant excepted.

The witness further testified that "She and B. S. Hensley were relatives, but were not friendly; that about a week before the barn was burned the defendant and his wife came to her house, and the defendant said he had 'come by to get some sweet tobacco.' The witness said she had none. The defendant replied: 'Why don't you go down to Back Hensley's and get some? Why don't you get $5 worth and never pay for it? Back Hensley is getting rich too fast, anyhow. He is getting rich faster than anybody on the creek. He has a fine barn, but that will not stand two years.'" The defendant objected to the above evidence; the objection was overruled, and the defendant excepted.

The objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent. *Barnhardt v. Smith,* 86 N. C., 473; *Smiley v. Pearce,* 98 N. C., 365; *Hammond v. Schiff,* 100 N. C., 161; *State v. Stanton,* 118 N. C., 1182; *McRae v. Malloy,* 93 N. C., 164. The same rule applies to an objection to the Judge's charge, when it consists of several propositions. *Bost v. Bost,* 87 N. C., 477; *Insurance Co. v. Sea,* 21 Wall., 158. Some of the evidence objected to by the defendant was clearly admissible. But waving this rule of practice for the purpose of the argument, we do not see that any of the testimony was incompetent. The defendant's counsel in his argument specially pointed out as incompetent the following statement of the witness: "This speech about matches referred to some matches which I had given the de-

fendant's children the evening before." We do not understand why it was not competent for the witness to state as a fact that she had given matches to the defendant's children, when this evidence is considered, as it should be, in connection with the conversation that took place between the witness and the defendant, and to which the statement of the witness expressly referred. The defendant went to the witness' house the morning of the day after the fire and stated that Back Hensley's barn was burned the night before, and that he had seen it burn. To this the witness replied: "I think I furnished the matches that burned it," whereupon the defendant said to the witness: "Julia, you don't think that." The witness said: "I know it," and the defendant replied: "If you think that don't say anything about it." Can it be doubted that the jury might have inferred from this colloquy between the witness and the defendant that the latter had knowledge of the fact that the witness had given matches to his children the previous night? Indeed, the evidence was sufficient for them to draw the conclusion therefrom that he had received the matches from his children, and they also might have inferred that he sent his children for them. This interpretation of the evidence is greatly strengthened and the view taken by us made still more apparent as the correct one by the subsequent part of the evidence, in which it appears that about a week before the fire occurred the defendant asked the witnesss why she did not go down to Back Hensley's and get some of his sweet tobacco, as much as $5 worth and never pay for it, and that the defendant said at that time that Hensley was getting rich faster than anybody on the creek, and that "he has a fine barn, but it will not stand two years." This might be regarded as an indirect threat that defendant would burn the barn, and when taken in connection with the former part of the testimony fully

warranted the jury in finding that he procured matches through his children for that purpose, and that he intended by his language to the witness to induce her to suppress her knowledge of the matter. The defendant's counsel insisted that it was not competent for the witness to testify that when, in her conversation with the defendant, it was stated by her that she thought she had furnished the matches that burned the barn she referred to the matches given by her to the defendant's children. Without this expression of the witness the very language of the conversation clearly and conclusively shows that she did refer to those matches, because it does not appear that she furnished any other matches. The matches given to the children were the only ones that could have been referred to by the witness. It will not do to separate one part of a witness' testimony from the other parts, and then object to the part thus separated as incompetent. This is not the proper way of testing the admissibility of testimony. The part so objected to must be considered with what precedes and follows it, in order that it may be seen and passed upon in its relation to the whole of the testimony. If detached and considered in its isolated position, without reference to the other testimony, it may appear to be incompetent, whereas when read with reference to the context it is readily seen to be not only competent in form and substance, but very material and relevant to the controversy. This objection is not well taken and must be overruled.

We have considered the case somewhat more at length than we would otherwise have done, not only because of its importance and the serious consequence to the defendant it involves, but because the exceptions were earnestly and ably discussed before us by the defendant's counsel and the correctness of his position zealously advocated and insisted upon.

After a most careful examination of the facts and authorities, we have been able to discover nothing in the exceptions

or the record on which the judgment ought to be reversed. It must be so certified, to the end that further proceedings may be had according to law.

No error.

STATE v. FRITZ.

(Filed December 15, 1903.)

1. DUELING—*The Code, sec. 1012.*

   The challenge to fight a fair fight with fists and hands and not to use any deadly weapon is not dueling.

2. AFFRAY—*Criminal Law.*

   The fighting of two persons in the presence of seven persons constitutes an affray.

3. JURISDICTION—*Superior Court—Justices of the Peace—Dueling.*

   Where there is an indictment in the superior court for an affense of which it has original jurisdiction, and a lesser offense is proved, it will retain jurisdiction, although it does not have original jurisdiction of the lesser offense.

4. DUELING—*Assault—The Code, sec. 1012—Acts 1885, ch. 68.*

   A person indicted for dueling may be convicted of an assault.

5. PUNISHMENT—*Justices of the Peace—Superior Court—Jurisdiction.*

   Where a person is convicted in the superior court of an offense of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose.

INDICTMENT against James Fritz, heard by Judge *B. F. Long* and a jury, at August Term, 1903, of the Superior

Court of McDOWELL County. From a judgment of guilty on a special verdict, the State and the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

CLARK, C. J. The defendant and one Hollifield were indicted under The Code, section 1012, in that they "Did unlawfully and wilfully send and accept challenge to fight a duel, and did fight a duel." Fritz alone was on trial.

The jury returned the following fact found as a special verdict: "That in January, 1903, the defendants had a fight on Sunday on Buck Creek, McDowell County; that on the night before the fight Fritz came to John Padgett's house where Hollifield was and said he would fight Hollifield, offered to fight him then, but said he would meet him anywhere and fight fair. No time and place were agreed upon that night. Fritz came by Padgett's on this occasion cursing Hollifield and offering to fight; Hollifield sent Padgett to see Fritz next day and tell him to come down and fight; Padgett went and told Fritz what Hollifield said, and Fritz said he would come; the agreement was to meet at a certain corner tree about midway between where Hollifield was at Padgett's and place where Fritz was when witness Padgett delivered the message. The agreement was to fight a fair fight with fists and hands and not to use any deadly weapon. On the the morning of this day when Padgett delivered the message to Fritz and Fritz agreed to fight, Padgett told Hollifield or sent him word that Fritz would come and fight at the corner tree, and both did meet there that day, two persons coming with Padgett, and these with the others made seven persons, in whose presence, and in two minutes after meeting, they did fight with hands and fists and without the use of deadly weapons until one was pulled off the other. There was no

serious damage and both fought a fair fight, with fists and hands. If upon this state of facts the Court is of the opinion that the defendant is guilty of the offense with which he stands charged, the jury find him guilty, but if the Court is of the opinion that the defendant is not guilty, the jury find him not guilty." Upon these facts the Court instructed the jury to find the defendant not guilty of fighting a duel as charged, and they so find; and the Court further instructed the jury to find the defendant guilty of an affray under the bill, and they so found. Judgment was rendered that defendant be discharged as to fighting the duel. The State excepted and appealed. The Court adjudged that the defendant pay a fine of ten dollars and the costs as to the affray. Defendant appealed.

In the appeal by the State there is no error. Webster's International Dictionary defines "duel" to be "a combat between two persons, fought with deadly weapons by agreement." The Century Dictionary, Worcester's and Stormonth's give the same definition, as does also Black's Law Dictionary. Dueling was an offense at common law. 4 Bl. Com., 145. In 2 Bishop's New Criminal Law, section 313 (2), it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. 10 A. & E. Enc. (2 Ed.), 311. Both at common law and under our statute the offense is complete, although no casualty results. It is clear that here there was neither an invitation to, nor an engagement by agreement in, a deadly combat. If the parties felt that they were bound to fight it is to their credit that they both kept their agreement "to fight a fair fight and not to use any deadly weapon," and that no serious damage was done. The statute does not visit such conduct as this with deprivation of the privilege of holding "any office of trust, honor or profit in the State," without

benefit of "any pardon or reprieve to the contrary notwithstanding." The Code, section 1012.

In the appeal by the defendant there is likewise no error. The facts found certainly constituted an affray, which is a mutual fighting of two or more by consent in a public place. The presence of seven other persons made it a public place, but if in a private place it is still an assault. *State v. Baker,* 83 N. C., 650; Bouvier's Law Dict., "Affray." An affray consists of mutual assaults, of which one person, as in this case, may be convicted, where the other may be acquitted or not put on trial. *State v. Brown,* 82 N. C., 585. Dueling is simply an aggravated form of affray (4 Bl. Com., 145), and under such indictment the parties may be convicted of a mutual fighting by consent without deadly weapon. The charge gave jurisdiction to the Superior Court, which it retains, though the proof is of an offense of which a justice of the peace has jurisdiction, but on conviction of the simple assault the punishment must not be beyond that which a justice of the peace could impose. *State v. Ray,* 89 N. C., 587; *State v. Fesperman,* 108 N. C., 770. The charge of the greater offense warrants a conviction of a lesser one embraced in it, just as on an indictment for murder there can be a conviction of murder in the second degree or manslaughter, a principle which chapter 68, Laws 1885, extends to authorize a conviction of assault, if the evidence warrants it, though the prisoner is acquitted of the felony upon an indictment for any felony which includes an assault as an ingredient.

No error.

STATE v. BIGGS.

(Filed December 18, 1903.)

PHYSICIANS AND SURGEONS—*Licenses—The Code, secs. 3122, 3124—Acts 1903, ch. 697—Constitution of North Carolina, Art. I, secs. 7, 31—Const. U. S., Fourteenth Amendment.*

Under a special verdict finding that the defendant advertises himself as a non-medical physician, curing disease by a system of drugless healing and treating patients by such system without medicine, claiming not to cure by faith, but by natural methods, without medicine or surgery; and that he administers massage, baths and physical culture, manipulates the muscles, bones, spine and solar plexus, and kneads the muscles with the fingers of the hand, writes no prescriptions as to diet, but advises his patients what to eat and what not to eat, the defendant is not guilty of practicing medicine without license though he admits that he was not licensed to practice medicine by the state medical board; that he charges fees for his services, and does not claim exemption as a nurse, midwife, or as curing by prayer.

INDICTMENT against Andrew C. Biggs, heard by Judge W. R. Allen and a jury, at May Term, 1903, of the Superior Court of GUILFORD County. From a judgment of guilty on a special verdict the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
C. M. Stedman and *E. J. Justice,* for the defendant.

CLARK, C. J. The defendant is indicted on a charge that he "did unlawfully and wilfully begin, engage in and continue the practice of medicine and surgery and the branches thereof for fee or reward, without having obtained a license so to do from the Board of Medical Examiners of the State of North Carolina." Upon the facts found the Court was of opinion that the defendant was guilty. The defendant appealed from the judgment imposed.

The special verdict found that the defendant advertised himself as a "non-medical physician"; that he held himself out to the public to cure disease by a "system of drugless healing, and treats patients by said system without medicine, claiming not to cure by faith"; that he advertises to cure by "natural methods," without medicine or surgery. The only acts that he is found by the verdict to have performed are that "he administers massage, baths and physical culture, manipulates the muscles, bones, spine and solar plexus, and kneads the muscles with the fingers of the hand. He writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs." It was admitted that the defendant was not licensed by the State Medical Board, and claims no exemption under the provisions of the act of 1903, as a nurse or midwife, nor as one curing by prayer, and then there is the important finding that "the defendant charges a fee or reward for his services," and has treated patients by the above treatment and received payment therefor since the passage of chapter 697, Laws 1903, "To define the practice of medicine and surgery."

Section 3124 of The Code requires that every person who applies for license to practice "medicine or surgery or any of the branches thereof," shall stand an examination in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, *materia medica,* therapeutics, obstetrics and the practice of medicine." There was added by chapter 117, Laws 1885, the following provision: "And any person who shall begin the practice of medicine or surgery in this State for fee or reward, after the passage of this act, without first having obtained license from said Board of Examiners (meaning the State Board of Medical Examiners) shall not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or sur-

gery or any of the branches thereof, but shall also be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $25 nor more than one hundred dollars or imprisoned at the discretion of the Court for each and every offense."

The constitutionality of this last act has been vigorously assailed in the courts on the ground that every one had an "inalienable right to life, liberty and the pursuit of happiness," as our great Declaration phrases it, and that by that guarantee it is the right of every one to earn his livelihood by pursuing any calling or vocation not unlawful, and that to place his liberty to do so within the power of a committee chosen by those already pursuing any given calling would be to infringe upon section 7, Article I of our State Constitution, which forbids exclusive privileges and emoluments to any set of men, and section 31 of the same article, which prohibits "monopolies and perpetuities." Of late years there has been added the argument that such act is also obnoxious to the Fourteenth Amendment to the Constitution of the United States, which prohibits any State "to deny to any person the equal protection of the law."

There was undeniably great force in the argument on that side. The law-making power slowly in this State and in others yielded to the view that it could or should pass such act. In 1858-'59, chapter 258, it first incorporated "The State Medical Society," and authorized the above examination, and prohibited any one to practice medicine or surgery or prescribe for the cure of diseases for fee or reward without such license, but was careful to add a proviso that no one who should practice without such license should be guilty of a misdemeanor, the only penalty being that if he practiced on credit he could not recover his fees in the courts. The law remained thus till the above-recited act, passed in 1885, and which was made prospective. The constitutionality of this

last statute was fully considered, and after a most able argument against it by counsel was sustained by this Court, but not without great hesitation, and upon the ground solely that the act was "an exercise of the police power for the protection of the public against incompetents and imposters, and in no sense the creation of a monopoly or special privilege." *S. v. Call,* 121 N. C., 646. If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the Legislature was prohibited by the Constitution from enacting it, nor could the Legislature restrict the cure of the body to the practice of "medicine and surgery," or establish any State system of healing. *State v. McKnight,* 131 N. C., 723.

After these decisions moderation and wisdom would have suggested that the matter rest. Those who wish to be treated by practitioners of medicine and surgery had the guarantee that such practitioners had been duly examined and found competent by a board of gentlemen eminent in that high and honorable profession, and those who had faith in treatment by methods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practice their faith and be treated if they chose by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possessed this right, and that the Legislature could not, under the Constitution, restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery" the Legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems—"allopathic," "homeopathic," "Thompsonian" and the like—should be ex-

amined upon a course, such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be upon the Board of Examiners.

At the last session of the General Assembly the following act (1903, ch. 697), was passed amendatory of section 3122 of The Code: "For the purpose of this act the expression 'practice of medicine and surgery' shall be construed to mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever; provided that this shall not apply to midwives nor to nurses; provided further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths, shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis; provided this act shall not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means."

Chief Justice Pearson in *McAden v. Jenkins,* 64 N. C., 801, noted, as of common knowledge, and reiterated in *Railroad v. Jenkins,* 68 N. C., 505, that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. Though there may be no promoters here, the same rule applies to this act amending the charter of this corporation, in whose supposed interests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and sur-

gery," the act essays to provide that the expression "practice of medicine and surgery shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or *without drugs*, surgical operation, surgical or mechanical appliances, or *by any other method whatsoever.*" That is, the practice of surgery and medicine shall mean practice without surgery or medicine if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The Legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another.

Again, the act means more than its friends probably intended, for it says: "Any case of disease, physical or mental, real or imaginary." Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the State Medical Society as an M. D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs on the court-house square who banishes headache, real or imaginary, by rubbing his hands over some credulous brow. He, too, must be an M. D. Then there is the closing expression forbidding treatment "for fee or reward" by other than an M. D., "by any other method whatsoever." This would take in all the old women and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, "real or imaginary," for a small compensation. Then it is forbidden to relieve a case of suffering, "physical or mental," in any method unless one is an M. D.

It is not even admissible to "minister to a mind diseased" in any method or even dissipate an attack of the "blues" without that label duly certified. Is not this creating a monopoly and the worst of monopolies that diseases shall not be cured or alleviated, whether real or imaginary, mental or physical, though without medicine or surgery, "if for a fee," unless one has undergone an examination on "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, *materia medica,* therapeutics, obstetrics and the practice of medicine"? Such examination is eminently proper for one who holds himself out as an M. D., and those who wish to employ an M. D. should certainly have the guarantee that is given by his license that the M. D. is competent. But how about those who are too poor or too ignorant or too perverse to wish that kind of treatment? Is it requisite that the man who treats a diseased ear shall really be competent in obstetrics, or that it is a penalty to treat a disease of the eye unless the operator understands chemistry, or that it is indictable in this State to remove corns or to plug teeth without full knowledge of the *materia medica,* or to banish headache by the application of the hands without having passed a satisfactory examination on anatomy, or to apply a fomentation without being able to "pass up" on therapeutics, or to sell a little herb tea for the stomach-ache without being scientifically versed in pathology and physiology? The act is too sweeping. Besides, the Legislature could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the Constitution.

Our early legislation naturally gave physicians no special privileges, but it was directed solely to fixing a limitation upon their charges and providing penalties for malpractice. Were a monopoly of all treatment of diseases conferred upon M. D.'s it would necessarily follow that the Legislature would have to prescribe their scale of charges again. That matter could not, with due regard to the public interest, be left to a monopoly. The medical profession merited and obtained a due share of prosperity prior to above statute of 1903 and will receive no great detriment because the defendant cannot be punished under its provisions.

Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease except by their own system is quackery. Is this point to be decided by the M. D.'s themselves through an examining committee of five of their own number, or is the public the tribunal to decide by employing whom each man prefers, whether allopath, homeopath, osteopath or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it, but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, heterodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others

under his care, whereby they are injured, he is liable to punishment, but whether it was proper treatment or not is a matter of fact to be settled by a jury of his peers and not a matter of law to be decided by a judge nor prescribed beforehand by an act of the Legislature.

The practice of medicine and surgery, in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. In the Code of Hammurabi, King of Babylon, fifteen centuries older than The Code of Moses, and which, engraved on a column of black diorite, was but recently dug up at Susa in ancient Elam, there are found (sections 215-225) regulations of the medical profession, fixing a scale of fees and penalties for malpractice. Physicians are mentioned in both the Old and New Testaments. Jeremiah asks: "Is there no balm in Gilead? Is there no physician there?" The public have a right to know that those holding themselves out as members of that ancient and honorable profession are competent and duly licensed as such. The Legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title of M. D., or prohibiting the use of such remedies altogether, neither of which results the Legislature could have contemplated, and both of which are forbidden by the provisions of the Constitution above cited.

In this case the defendant is found guilty of the following acts, and no more:

(1) Administering massage, baths and physical culture.

(2) Manipulating muscles, bones, spine and solar plexus.

(3) Kneading the muscles with the fingers of the hand.

(4) Advising his patients what to eat and what not.

And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are harmless and not indictable "unless done for fee or reward." There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, *materia medica* and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.

It is not only in the scope of the police power for the State to regulate the "practice of medicine and surgery" and to throw around the public any reasonable protection against unfit members of that honorable profession and provide against malpractice, but the General Assembly can prohibit any pretended art of healing which is calculated to deceive and injure the public. It is also within its power to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practice it. But it is not found here that the defendant is deceiving and injuring the public or is ignorant and incompetent, to the detriment of the public, in the application of the methods he uses. It may be that if he were not there some of the patients might call in an M. D., but that is due possibly to the ignorance or perversity of the patients who may prefer the defendant's methods and scale of fees. The police power does not extend to such cases.

The law is thus stated in *Lawton v. Steele,* 152 U. S., pp.

137, 138: "The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." After citing cases, it is said, on page 138: "In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property and a practical inhibition of certain occupations harmless in themselves and which might be carried on without detriment to the public interests." See also *State v. Pendergrass,* 106 N. C., 667; *Ohio v. Gardner,* 58 Ohio St., 599, 41 L. R. A., 689.

License is required for the practice of pharmacy, of dentistry, of law and many other skilled professions. We have a State system of law, for the "Law is the State," and laws are prescribed by the Legislature, and we also have a State system of education, yet it is not indictable for one not a lawyer to draw wills, deeds, bills of sale or any other legal instrument whatever, nor is it made punishable to settle litigation out of court by arbitration or otherwise without the aid of a lawyer, nor to teach in other than the State schools. Though there are many methods of treating disease, among which the Legislature is not authorized to select one as the State system, excluding all others, yet this act, if valid, would make it punishable by law to charge a fee for treatment of "any disease, real or imaginary, mental or physical, by any method whatever," unless the party has been admitted by a committee from one school of treatment upon examination of that system, thus denying mankind any relief from pain and suffering except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief—not by the M. D.'s themselves

nor by the courts. Judges are lawyers and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners who eschew medicine and surgery may well object to leaving the question whether "medicine and surgery" is the only permissible method of treatment to be decided by the practitioners of that method.

The defendant is not charged nor shown to be an osteopath, and disclaims being one. His learned counsel contends that the act of 1903, ch. 697, is further unconstitutional because of the following (quoted from his brief): "There is no provision for the examination of any but allopaths and osteopaths. It provides that all persons, except midwives, nurses and those who profess to heal by prayer, who minister to the sick for fee or reward 'by any other method whatsoever,' shall be construed to be practicing medicine or surgery, and then follows this language: 'Provided further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis.' The osteopath is required to stand an examination in surgery and every other branch that those belonging to the regular school of medicine are required to be examined in, except pharmacy, *materia medica*, therapeutics and the practice of medicine, and in addition he is required to stand an examination in branches that the regular medical student is not required to be examined on, as follows: 'histology, urinalysis and toxicology, regional anatomy, neurology, bacteriology, gynecology and physical diagnosis.' But it is remarkable that he is not required to

pass examination in the branches that his profession recognizes and teaches to be of special importance in the practice of osteopathy, such as principles of osteopathy, osteopathic manipulations and osteopathic diagnosis."

As his client is not an osteopath, we are not called upon in this case to pass upon the alleged discrimination against osteopaths in the prescribed course of study. But if it be objected that we have only shown that the defendant's practice did not call for the examination required, as above set out, for an allopath, it may be as well to say that the acts of which he was convicted of doing "for a fee," to-wit, using massage, baths, physical culture, manipulating muscles, bone, spine and solar plexus, and advising his patients as to diet, could be done as safely to the public, so far as shown, without an examination on "histology, urinalysis and toxicology, bacteriology, neurology and gynecology," which are some of the things added to the course by the aforesaid act, for the comfort and convenience of those wishing to obtain license to practice osteopathy, and of course only to protect the public against incompetents in that line of practice.

It is possible, however, that an expert knowledge of gynecology is not essential in administering baths, and there is room for serious doubt whether bacteriology and toxicology are connected with massage in any way.

The term "practice of medicine and surgery" embraces probably the larger and certainly by far the most profitable part of the "treatment of diseases," but is not co-extensive with the latter term and cannot be made so unless "surgery and medicine" are adopted as the State system of treatment, a monopoly, and all other methods are made indictable. On the other hand, the State Medical Society would hardly wish to broaden out so as to take in all methods of treatment of diseases, for this would be to take in practitioners and practices which they would not wish to recognize. All the law

so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Doctor Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: "If the whole *materia medica* was sunk to the bottom of the sea it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this State has said that out of twenty-four serious cases of disease three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was Himself called the Good Physician, was told that other than His followers were casting out devils and curing diseases, He said: "Forbid them not."

Upon the special verdict the defendant should be adjudged not guilty.

Reversed.

WALKER and CONNOR, JJ., concur in result.

STATE v. MORGAN.

(Filed December 18, 1903.)

1. INDICTMENT—*Counts—Misjoinder—Acts 1891, ch. 29—Gaming.*

It is not a misjoinder of offenses to charge in an indictment the keeping and maintaining a gaming house and playing cards for money.

2. INDICTMENT—*Quashal—Gaming.*

In an indictment for keeping a common gaming house the use of the word "gaming" is sufficient.

3. WITNESSES — *Competency — Gaming — Constitutional Law — The Code, sec. 1215.*

In a prosecution for gaming a witness may be compelled to testify although his answer tends to criminate him, he being pardoned for the offense under The Code, sec. 1215.

4. WITNESSES—*Gaming.*

The privilege of refusing to answer an incriminating question is personal to the witness, and can be claimed by him only.

INDICTMENT against G. T. Morgan, heard by Judge *G. S. Ferguson* and a jury, at September Term, 1903, of the Superior Court of WILSON County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

MONTGOMERY, J. The bill of indictment in this case contained two counts. In the first the defendant was charged with keeping and maintaining a gaming house—a nuisance at common law; and in the second with playing cards, a game of chance, for money, under chapter 29 of the Laws of 1891.

The counsel of defendant entered a motion to quash the indictment upon two grounds: First, because two offenses "created by different statutes" and punished differently were joined; and second, for that the indictment did not charge that the games played were ones of chance, and that they were played at a place, or tables, where games of chance were played; and further, that the offense of keeping a common gaming house is a separate offense from playing at a game of chance, and as the two offenses are charged in the same indictment no judgment could be pronounced upon a general verdict of guilty.

The Court committed no error in refusing the motion. The two offenses charged, separate and distinct as they are, are not felonies but misdemeanors, and they can be properly charged in the same indictment; and the punshment prescribed by law for each was not different. The Court might have, in its discretion, quashed the indictment, but was not compelled to do so. *State v. King,* 84 N. C., 737; Wharton Criminal Law, sec. 414.

Besides, the offenses charged in the indictment, though distinct, are of the same nature, and a similar judgment might be passed in each case, and there can be no objection to the indictment setting forth the offenses in different counts. Wharton, *supra,* section 415.

A case exactly in point is that of *Wheeler v. State,* 42 Md., 563. In that case it was decided that "counts under the statute against gaming and counts for keeping and maintaining such a common gambling house as to constitute a nuisance at common law may be properly joined in the same indictment."

As to the defendant's second ground for the quashing of the indictment: It was not necessary to charge in the indictment that the games played at the gaming house were games of chance. That is sufficiently implied in charging that the

defendant kept a common gaming house, the word "gaming" having a definite meaning in law, *i. e.*, gambling, the act of playing games for stakes or wages. It is not essential either that the game should be played by using ordinary gaming gards. Gaming may be done by other means or devices as well as cards. When the law uses the word "gaming" it not only uses a term well defined and known to the law writers, but its meaning is well understood by the citizens of the Commonwealth; and when the words "gaming house" are used all English-speaking people know the meaning of them. They know the truth of the language used by this Court in the case of *State v. Black,* 94 N. C., 809, where it was said: "A house so kept is a public nuisance. The natural tendency of it is to corrupt and debauch those who frequent it. It gives rise to cheating and other corrupt practices; it incites to idleness, encourages dishonest ways of gaining property, and brings together for unlawful and vicious purposes numbers greater or smaller of idle and evil-disposed persons, who corrupt others, especially younger persons who might otherwise be honest, industrious and useful people."

The first witness introduced for the State was asked if he ever saw any cards played in the room of the defendant. He declined to answer the question on the ground that the answer might tend to criminate him, and claimed his constitutional privilege. Under protest he was compelled to answer questions tending to prove the gaming. He was properly made to answer the questions. The Code, sec. 1215. But suppose he was not made competent by section 1215, and should not have been made to answer the questions, the ruling of his Honor would have only been injurious to the witness, for it was a matter entirely personal to him. The defendant could not complain of it. In the case of *Boyer v. Teague,* 106 N. C., at p. 625, 19 Am. St. Rep., 547—the case of a contest for a public office—the Court said: "Neither contestant nor con-

testee is called upon to contend for the rights of a witness who does not demand protection, and if compelled to testify against his will it does not follow that testimony, competent without objection on his part, should not go to the jury for what it may be worth." The right to refuse to answer incriminating questions is a personal privilege of the witness, and can be claimed by him only, and not by either party. 11 Am. & Eng. Enc., p. 541, and cases there cited. Several other witnesses who participated in gaming at the defendant's gaming house testified under their protest and compulsion of the Court.

At the conclusion of the State's evidence the defendant's counsel moved that the solicitor be required to elect upon which count he would ask for a verdict. The Court properly refused to grant the motion, for reasons we have already set out in discussing the motion to quash, and for the same reasons the motions and arrest of judgment were properly refused.

Affirmed.

STATE v. REGISTER.

(Filed December 18, 1903.)

1. CONTINUANCES—*Superior Court—Special Terms—The Code, secs. 913, 914.*

   Where by reason of the accumulation of criminal business a special term of the superior court is called, an indictment found at the special term may be tried during that term, and it is not error to refuse to continue the case for that reason.

2. JURY—*Special Venire—Freeholders—The Code, sec. 1739—Findings of Court.*

   A finding by the trial judge that persons drawn on a special venire were not freeholders is conclusive on appeal.

3. JURY—*Finding of Court.*

The finding of the trial judge that jurors were indifferent is not reviewable on appeal.

4. SPECIAL VENIRE—*Homicide—Accessory—The Code, sec. 977.*

Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a juror selected from a special venire ordered in the case.

5. EVIDENCE—*Declarations—Res Gestae—Homicide.*

Where a person indicted for murder procured a witness to aid in the commission of the homicide, statements made by him to the witness at the time are competent as a part of the *res gestae.*

6. EVIDENCE.

A letter written by an accused tending to show an attempt to manufacture or suggest statements that a witness should testify to in his interest is competent against the accused.

7. EVIDENCE—*Witnesses—Impeachment of Witnesses.*

An indictment against a witness who had turned State's evidence is not admissible to impeach him.

8. ACCOMPLICES—*Evidence.*

A person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious in so doing.

9. EXCEPTIONS AND OBJECTIONS—*Instructions.*

A "broadside" exception to a charge will not be considered on appeal.

10. NEW TRIAL—*Newly Discovered Evidence.*

A new trial will not be granted in a criminal action for newly discovered testimony.

11. BRIEFS—*Rules of Supreme Court, 32, 34—Appeal—Exceptions and Objections—Abandonment.*

Where on appeal an exception is not referred to in the brief of appellant, it will be taken as abandoned.

STATE *v.* REGISTER.

INDICTMENT against J. B. and H. B. Register, heard by Judge *Fred. Moore* and a jury, at August (special) Term, 1903, of the Superior Court of COLUMBUS County. From a verdict of guilty and judgment thereon the defendants appealed.

Robert D. Gilmer, Attorney-General, and *Lewis & Schulken,* for the State.

John D. Bellamy, C. M. Bernard and *Donald McCracken,* for the defendants.

CLARK, C. J. The prisoner Jabel B. Register is indicted and convicted of murder in the first degree, and H. B. Register, his father, is indicted in the same bill and convicted of being an accessory before the fact. The evidence of the State, if believed, showed that on Saturday afternoon, 28 March, 1903, Jabel met Cross Edmundson and told him his father (H. B. Register) wished to see him; that together they went up to the house of H. B. Register, who told them that Jim Staley, a colored man staying with Jesse Soles, had between $1,000 and $2,000, and he wanted them to "hold up Jim Staley and get his money and kill him if necessary"; that H. B. Register furnished them with two guns he had ready and some canned goods in a tow sack, and under H. B. Register's direction they left about 10:30 at night to go down to commit the robbery; that the place where Jim Staley resided being some miles off, after traveling part of the way they laid down in the woods and slept till next morning, when they resumed their journey and then spent the day near a still-house till about dusk, when they started to Jesse Soles' house, where Jabel Register went up to the window and fired both barrels through the window into the house, killing Jesse Soles and Jim Staley; he then entered the room, remained a while, came out and left; the house was soon afterwards in a

blaze, and Cross Edmundson, when three or four miles away on their return, asked Jabel what it weant, and after some hesitation he replied that "he reckoned his papa and Jesse Soles were having a settlement." The only direct evidence is that of Cross Edmundson, the accomplice, which is full, minute and dramatic in its details. There were witnesses and proof of sundry circumstances, which, if believed, strongly corroborated Edmundson at sundry points in his narrative.

The prisoners were tried at a special term, the commissioner reciting in the ordinary form that there was such an accumulation of criminal business as rendered a special term necessary. The Code, sec. 914. The prisoners moved for a continuance on the ground that this bill being found at that special term it was not part of the accumulation of criminal business specified in the commission as a reason for ordering such special term and hence the Judge had no power to try them, and the prisoners excepted.

The first exception is to the refusal of this motion and is without merit. The power of the Governor to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited as a reason in the commission is the power of the Judge restricted to the trial of indictments found before that term. The Code, sec. 913; *State v. Lewis,* 107 N. C., 967, 11 L. R. A., 105; *State v. Turner,* 119 N. C., 841.

The second exception is for the refusal of the motion to quash the venire on these facts: the Judge ordered a *special* venire of 200, and the names were drawn from the box in open Court as provided by section 1739 of The Code, which provides that "the names so drawn (being *freeholders*) shall constitute a special venire." The Court undertook to ascertain whether those whose names were so drawn were freeholders or not, "and ascertained from the tax list of the

county, the officers of the Court and other sources that 37 (of 237 names so drawn) were not freeholders," and the names of these 37 were not placed on the venire, leaving 200. The case on appeal further says that the officers and others from whom such information was had were not sworn, but that it appeared that the names of none of the 37 were on the tax list of 1902 as owner of realty; that there was no suggestion or evidence that any one of them was a freeholder; that there was no objection or exception to this mode of proceeding, nor any request that the officers or other persons giving information be sworn, and the Judge found at the time as a fact that none of the 37 was a freeholder and that the 200 were freeholders. This finding of fact is binding on us and is fatal to the exception. Besides, the prisoners made no exception at the time, nor can they except to the rejection of a juror, since their right is "to reject, not to select," and moreover they are in no position to complain, for they did not exhaust their peremptory challenges. The practice of drawing the venire from the box in open Court was specially commended in *State v. Brogden,* 111 N. C., 656. Other cases are *State v. Moore,* 120 N. C., 570; *State v. Dixon,* 131 N. C., 808; *State v. Utley,* 132 N. C., at p. 1032. In *State v. Cody,* 119 N. C., 908, 56 Am. St. Rep., 692, the Court said: "It is not error in the trial Judge, when ordering a special venire, to direct the sheriff to summon only freeholders," and in the present case the Judge ascertained that fact himself instead of leaving it to the sheriff to determine. There was and could be no prejudice to the prisoners in what was done, but it will always be better practice to swear the officers and others giving information on such occasions.

The able counsel of the prisoners who entered these two exceptions doubtless did so out of abundant caution, not rely-

ing upon them himself, but being uncertain "how they might strike the Court."

The third exception is to the indifference of two jurors who the Court, as the "trier of the facts," found as a fact were indifferent. Such finding is not reviewable. *State v. DeGraff,* 113 N. C., 688; *State v. Potts,* 100 N. C., 457; *State v. Green,* 95 N. C., 611; *State v. Collins,* 70 N. C., 241, 16 Am. Rep., 771.

The fourth, fifth and sixth exceptions are omitted from the brief of the prisoner's counsel, and therefore we take it they are abandoned; Rules 32 and 33, 131 N. C., 831; but at any rate they are without merit. The fourth exception was to the trial of H. B. Register by the special venire on the ground that a special venire can be drawn only in capital cases, but The Code, section 977, provides that the principal felon and an accessory before the fact may be indicted and tried together. Further, the jury had already been passed upon and each juror accepted before the objection was made and without exhausting the peremptory challenges. It is a conclusive presumption in such case that the jury is unobjectionable. *State v. Pritchett,* 106 N. C., 667; *State v. Potts, supra; State v. Freeman,* 100 N. C., 429; *State v. Jones,* 97 N. C., 469. The fifth and sixth exceptions were to the proper rejection of incompetent hearsay evidence.

The seventh exception was to the evidence of Cross Edmundson, that in his statement before the justice of the peace that on the aforesaid 28th March, 1903, H. B. Register had said that Bill Soles, brother of Jesse Soles, and who lived near him, had two or three thousand dollars, and it would be no trouble to get it; that he could take two or three men and go there in his absence and make his wife get it. This was competent, for the testimony showed that it was part of the conversation in which H. B. Register was giving instructions as to "holding up" and robbing "the negro staying with Jesse

Soles, who had between one and two thousand dollars." Edmundson had detailed the other part of the conversation, and it was proper to admit this. Besides, the intent to commit robbery was involved in this trial, and this being so, evidence of different offenses of the same kind would be competent. *State v. Weaver,* 104 N. C., 758; *State v. Parish, Ib.,* 679; *State v. Walton,* 114 N. C., 783; McLain Crim. Law, secs. 415, 416. This declaration of H. B. Register was competent against him as a part of the *res gestæ* at the time he procured the witness to aid his son to commit murder for the sake of the robbery. The eighth exception is omitted from the brief of prisoners' counsel and is clearly without merit, being to the admission against H. B. Register, only, of a conversation between him and Edmundson a week after the murder. It strongly tended to show H. B. Register's connection with the crime and was corroborative of Edmundson's testimony. *State v. Staton,* 114 N. C., 813.

One Richardson testified that Jabel Register bought some canned goods at his store between sunset and dark on Saturday, 28 March, 1903, the day before the killing. Edmundson had testified that he and Jabel had similar canned goods furnished by H. B. Register on starting out that night. For the purpose of aiding Richardson in fixing the date, and for that purpose alone, he was properly allowed to state that it was on Tuesday or Wednesday that he heard of Jabel Register and Edmundson being at Nelson Toon's, where it was in evidence they had spent the night of the murder. This was the ninth exception, but it is not urged as error in the brief.

The tenth, eleventh, twelfth and thirteenth exceptions are essentially one as stated in the brief of prisoners, and are directed to the admission, as evidence against H. B. Register only, of a letter shown to be in his handwriting, tending to show an attempt to manufacture or suggest statements that a witness should make in his interest. The fourteenth excep-

tion is omitted from brief of prisoners, and besides requires no discussion, which last is also true of the fifteenth exception, which is to the exclusion of the bill of indictment against Cross Edmundson. It would have shown merely, if admitted and had been competent, that he had been charged by the grand jury with the murder, and his whole testimony went directly to establish his participation therein, being present aiding and abetting. The Court charged as requested, "The jury must carefully consider the testimony of Cross Edmundson and give it such weight as it may be entitled to; he stands before the jury as an accomplice," but declined to further charge that "it is dangerous to act exclusively on the testimony of an accomplice, and the jury shall require confirmatory testimony before they convict," or to further charge that "the unsupported testimony of an accomplice must produce entire belief" in the minds of the jury before they can convict. This refusal is the basis of the sixteenth, seventeenth and twentieth, twenty-first, twenty-fourth and twenty-fifth exceptions. In lieu thereof the Court charged fully and carecully on "reasonable doubt," and told the jury that while they could convict upon the uncorroborated testimony of an accomplice, "they should be cautious in convicting" upon such evidence, and left to them under proper instructions the evidence offered in corroboration, carefully calling to their attention the effect of evidence offered only as corroborative, and distinguished its effect and application from substantive testimony. It has been often held that there may be a conviction upon the unsupported testimony of an accomplice, and the charge of the Court, that while the jury can convict upon such testimony, yet they should be "cautious" in so doing, is quoted from *State v. Miller,* 97 N. C., 484, and is in line with all our authorities. *State v. Rowe,* 98 N. C., 629; *State v. Stroud,* 95 N. C., 626; *State v. Haney,* 19 N. C., 390; *State*

v. Wier, 12 N. C., 363. Here, indeed, there was much testimony tending to corroborate the testimony of Edmundson.

The eighteenth and nineteenth exceptions, in regard to the modification of the prayer as to the *alibi* attempted to be proved by Jabel Register, cannot be sustained. The prayer as amended is a correct statement of the law. The twenty-second exception is a "broadside" exception to the charge, and cannot be considered. Besides, the charge is in itself very full, careful and impartial, and the prisoners have no cause to complain. There is no twenty-third exception in the record or the briefs.

The prisoners also moved this Court for a new trial for newly discovered testimony, but such motion can only be made in civil actions. Our precedents are uniform that this Court has no jurisdiction to entertain such motion in criminal actions. *State v. Jones,* 69 N. C., 16; *State v. Starnes,* 94 N. C., 981; *State v. Gooch, Ibid.,* 1006; *State v. Starnes,* 97 N. C., 423; *State v. Rowe,* 98 N. C., 630; *State v. Edwards,* 126 N. C., 1051; *State v. Council,* 129 N. C., 513.

After the fullest consideration, we find

No error.

STATE v. TAYLOR.

(Filed December 18, 1903.)

1. FORMER CONVICTION — *Verdict — Plea—Judgments—Trial—Demurrer.*

Where the court sustains a plea of former conviction after the jury has returned a verdict of guilty, the proper practice is to strike out the verdict and sustain the plea as upon a demurrer by the state; and to enter a judgment of not guilty on the verdict as rendered is improper.

2. ORDINANCES—*Former Conviction—Towns and Cities—Disorderly Conduct—Assault—The Code, secs. 3818, 3820.*

A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the state for an assault.

3. FORMER CONVICTION—*Verdict—Judgments—Trial.*

Where the trial court sustains a plea of former conviction and enters a judgment of not guilty, without striking out the jury's verdict of guilty, it may, on reversal, proceed to enter judgment of conviction.

INDICTMENT against J. M. Taylor, heard by Judge *G. S. Ferguson* and a jury, at September Term, 1903, of the Superior Court of EDGECOMBE County. From a judgment for the defendant the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

CONNOR, J. The defendant was indicted at the September Term, 1903, of the Superior Court of Edgecombe County, for an assault with a deadly weapon. The record states that he pleaded *not guilty.* The case on appeal states that the defendant "admits the assault, but contends and introduces evi-

dence tending to prove that no deadly weapon was used." "The defendant pleads former conviction and offers in evidence the record of the mayor's court of the town of Tarboro, which shows that in August, 1902, a warrant was issued by the mayor against the defendant, charging that he 'did unlawfully violate an ordinance of the town of Tarboro, to-wit, ordinance No. 10, section 1, by fighting and disturbing the peace, contrary to said ordinance, against the statute in such cases made and provided, and against the peace and dignity of the State." The defendant was arrested upon said warrant, and judgment rendered as follows: "After hearing the evidence, and it appearing to the court that the defendant pleads guilty, it is considered and adjudged that the defendant pay costs, $2.85."

Ordinance No. 10 is in the following words: "No person or persons shall be permitted to disturb the good order and quiet of the town by fighting, making loud noises, using profane, boisterous and indecent language, or in any other manner, under a penalty of twenty-five dollars." The mayor testified: "I issued this warrant under ordinance No. 10 and tried the defendant for disturbing the peace of the town by fighting, exactly as set out in the warrant. There was no evidence of any disturbance by making loud noises or using profane, boisterous or indecent language; the evidence disclosed no disturbance or noise except the act of striking the said Will Pope. * * * The warrant shows what I tried Taylor for." At the close of the evidence the defendant asked the Court to charge the jury: "That upon the record on evidence the defendant has been tried and convicted of a simple assault for the offense under investigation." The Court declined to give the charge asked, but reserved its opinion. The jury returned a verdict of guilty of a simple assault. The solicitor prayed the judgment of the Court. The Court announced that, having reserved its opinion as to whether the plea of the

defendant of former conviction is good upon the record of the mayor's court introduced in evidence, he adjudges said record is sufficient to sustain the plea of former conviction, and therefore directed the clerk to enter a *judgment* of "not guilty," and directed that the defendant be discharged. The State appealed.

The record proper, which controls when conflicting with the case on appeal, states: "The jury upon their oath say that the said J. M. Taylor is not guilty in manner and form, as charged in the bill of indictment, of an assault with a deadly weapon, but is guilty of a simple assault, and thereupon it is ordered by the Court that the said J. M. Taylor go without day" (the Court holding the plea of former conviction as set out in the case on appeal to be good).

The record presents a singular condition of the case. There is a verdict of guilty of an offense of which, by reason of the form of the indictment, the Court has jurisdiction. *State v. Fesperman,* 108 N. C., 770, and cases there cited. The verdict is left standing as rendered with a *judgment* of "not guilty." His Honor having, upon consideration of the question of the sufficiency of the evidence to sustain the plea, decided against the State, should have stricken out the verdict and sustained the plea as upon a demurrer by the State, from which an appeal could be taken. The confusion in the record arises from the failure to observe the procedure pointed out by this Court in several cases. *Smith, C. J.,* in *State v. Pollard,* 83 N. C., 597, discusses the authorities and says: "It is true double pleading is allowed only in civil cases under the Statute of Anne, as was said by *Pearson, C. J.,* in *State v. Potter,* 61 N. C., 338, and the jury could not be empaneled to try at one time more than the issue of a single plea, but the difficulty is obviated by allowing the second plea and a jury trial on it after the verdict on a preceding plea, and the reasonableness of this practice commends itself to our approval."

The Court, in *State v. Respass,* 85 N. C., 535, approves the practice pointed out in Pollard's case. *State v. Washington,* 89 N. C., 535: "Regularly, the two pleas of former conviction and not guilty should be tried separately, since the plea of former conviction implies an admission of the criminal act and is inconsistent with an absolute denial. But the practice of trying them together has become not unusual, and is often convenient." *State v. Winchester,* 113 N. C., 641.

For the purpose of disposing of this appeal we assume that the solicitor demurred to the evidence offered to sustain the plea and that the Court overruled his demurrer. Thus viewing the case, we think that his Honor was in error. It is well settled that a town ordinance cannot make criminal or prescribe a punishment for acts which are indictable at common law or by statute. *State v. Austin,* 114 N. C., 855, 25 L. R. A., 283, 41 Am. St. Rep., 817; *State v. Stevens,* 114 N. C., 873. It is equally well settled that they may pass ordinances prohibiting disorderly conduct and impose a penalty for their violation, etc., and that ordinance No. 10 of the town of Tarboro is valid. It is substantially like the one set out in *State v. Cainan,* 94 N. C., 880. *Merrimon, J.,* says: "The ordinance mentioned in the warrant has reference to and forbids such acts and conduct of persons as are offensive and deleterious to society, particularly in dense populations, as in cities and towns, but do not *per se* constitute criminal offenses under the general law of the State. * * * The purpose of the ordinance is to promote good morals, the decencies and proprieties of society, and prevent nuisances and other criminal offenses which might result from the acts and conduct prohibited." In *State v. McNinch,* 87 N. C., 567, *Ashe, J.,* says: "His Honor seems to have had in his mind the crime of nuisance at common law, but the ordinance of the city was evidently intended to create different offenses from that. It was a police regulation, adopted not merely to secure the citi-

zens of the city against annoyance but to prevent the evil example of such immoral conduct."

By section 3820 of The Code the violation of a town ordinance is made a misdemeanor, jurisdiction whereof is vested in a justice of the peace. Section 3818 confers upon the mayor the jurisdiction of a justice of the peace "in all criminal matters arising under the laws of the State or under the ordinances of said city or town."

The warrant issued by the mayor was sufficiently definite. *State v. Merritt,* 83 N. C., 677. "A justice of the peace, and as well the mayor, has jurisdiction of a violation of a town ordinance, because it is a misdemeanor and the punishment thereof cannot exceed a fine of fifty dollars or imprisonment for thirty days." *State v. Cainan, supra.*

The offense for which the defendant is indicted in the Superior Sourt is a violation of the law of the State—an assault with a deadly weapon.

This brings us to the question whether the two prosecutions were for the same *offense. Ruffin, J.,* in *State v. Nash,* 86 N. C., 651, 41 Am. Rep., 472, thus states the law: "To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense, *the same both in law and in fact.*" "A single act may be an offense against two statutes, and if each requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *State v. Stevens, supra; State v. Robinson,* 116 N. C., 1046. Disorderly conduct, of which it is the duty and province of municipal authorities to take cognizance, may not, and often does not, involve an assault. When it does so the ordinance is directed against the *disorderly conduct* and the law of the State is directed against the breach of the peace. *Bleckley, C. J.,* in *McRea v. The Mayor,* 59

Ga., 168, 27 Am. Rep., 390, says: "Many transactions which are made penal by the general law of the State may at the same time afford material for a proper police ordinance. The State may deal only with the central element of the transaction, which is fringed all around with adjuncts that ought to be prohibited by ordinances as highly mischievous to the quiet of municipal society. In the country such adjuncts might not need repression, for there they might be comparatively harmless. In a city we think a man may fight in a way to violate an ordinance without being guilty of an assault and battery."

The defendant was tried before the mayor for a misdemeanor in violating the ordinance. It may be that he was not guilty upon the evidence. However this may be, the *offense* of which he was convicted was different from an assault, for which he is indicted. *Robbins v. People,* 95 Ill., 175. The demurrer of the solicitor should have been sustained.

As the verdict upon the plea of not guilty has not been set aside, we see no reason why the Court may not proceed to judgment. *State v. Battle,* 130 N. C., 655.

Error.

STATE v. BOGGAN.

(Filed December 19, 1903.)

1. DYING DECLARATIONS—*Evidence.*

The facts of this case make the dying declarations of the deceased competent.

2. HOMICIDE—*Evidence—Murder—Manslaughter.*

The evidence in this case is sufficient to justify the refusal of the trial judge to instruct the jury that there was no evidence of murder in the first degree, or second degree, or manslaughter.

3. JURY—*Improper Conduct—New Trial.*

The fact that a jury had an opportunity to see the locality where the homicide is alleged to have been committed and there is no evidence that any remarks were made among the jurors themselves or the officer attending them as to the condition and appearance of the place, is not sufficient to justify the granting of a new trial, the trial judge having declined to set aside therefor a verdict of guilty.

MONTGOMERY, J., dissenting.

INDICTMENT against Will Boggan, heard by Judge *C. M. Cooke* and a jury, at September Term, 1903, of the Superior Court of ANSON County. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
H. H. McLendon, for the defendant.

CONNOR, J. The prisoner was convicted of murder in the first degree and from the judgment of the Court appealed. The facts material to the decision of the exceptions set out in the record and case on appeal are as follows: On the night of February 28, 1903, the deceased met Morgan and Starnes

near the Klondyke Hotel in the town of Wadesboro. They went into and down an alley between the hotel and store of one Williams for the horse and buggy of the deceased. There was testimony on the part of the State tending to show that as the three persons went down the alley the prisoner was standing up beside a wall and deceased spoke to him in a friendly manner, the prisoner responding: "Hello, you d— son of a b—." Deceased said "I do not like to take that off of no man," and made an attempt to turn around. The other two persons with him prevented him from doing so, and the three started on down the alley. Prisoner followed them. One of the witnesses swore that he saw a pistol in prisoner's hand; that he turned deceased loose and started around the corner by the store; that he looked back and saw prisoner with pistol in his hand, arm outstretched, presenting it toward deceased, and he said: "I will break it off in you, you d— son of a b—." That he then saw the pistol fire. The prisoner turned and ran up the alley-way. Witness went to deceased and asked him if he was hit, and he said: "That negro has killed me." The witness said: "Boggan followed Sullivan, after using the words, ten or fifteen feet before he shot. He was about four or five feet from Sullivan when he shot him." The witness Starnes further testified: "I looked back and saw the negro following. I turned and told him to go back. He said: 'I'll be d— if I do.' Just about that time Sullivan stepped around me and said: 'I do not like to take that.' The negro said: 'I gave it to you and I'll be d— if I take it back; before I will I will break it off in you.' Sullivan pulled off his right glove and went to put it in his pocket, and as he did so the negro shot him." There was other testimony in regard to the identity of the prisoner. The prisoner set up an *alibi* and introduced testimony tending to sustain his contention that he was at another place at the time of the homicide. The deceased was shot on Saturday

night and died the following Tuesday. Dr. Bennett and Dr. Ashe saw him on Sunday morning. "He was then rational and very much composed." Doctors told him that the wound would very probably prove fatal. They extended some hope to him by means of an operation that might save him. They told him that they were preparing for statement he might make to the magistrate. Prisoner objected to this testimony; objection overruled. No statement by the prisoner was introduced.

Julius Sullivan, a brother of the deceased, was introduced and testified that he saw the deceased about 3:30 o'clock Monday morning. To an enquiry as to his condition deceased said: "I am in a bad fix." About 9 o'clock that morning deceased sent for witness and said: "Well, I am about to leave you all; I hate to leave my little children." Witness then asked him if he knew who shot him. He said: "Yes, I know who shot me; Will Boggan shot me. I have been knowing him all my life." Prisoner duly objected and excepted to the admission of this testimony. Daniel Crawford also testified to similar declarations of deceased made about the middle of Monday afternoon. Before making the statement as to who shot him deceased said: "I am getting weaker. I believe I am going to die." Witness said he hoped not. Deceased said: "Yes, he thought he was bound to die. The doctors thought he could not possibly get well." To all of which prisoner duly excepted.

The declarations of the deceased were clearly competent. Every condition upon which dying declarations are made competent were shown to exist. The ruling of his Honor is sustained by a long and uniform current of decisions of this Court. *State v. Dixon,* 131 N. C., 808.

We have examined the other exceptions to the admissions of testimony. We concur with his Honor in respect to them.

The prisoner requested his Honor to charge the jury:

"That upon the evidence the jury cannot find a verdict of murder in the first degree." This was declined, and prisoner excepted. His Honor could not properly have given the instruction. According to the decisions of this Court, there was ample evidence, if believed by the jury, to show premeditation. Similar instructions were asked, in regard to verdict of murder in the second degree and manslaughter, and declined. The ruling upon the first prayer disposes of these. His Honor might well have given the instruction as to manslaughter, but of course the prisoner cannot complain of his failure to do so. In no possible point of view could they find the prisoner guilty of manslaughter. His Honor's charge, set out in full, is clear, exhaustive and absolutely fair to the prisoner. If there was any error the State alone had a right to complain. The real contest in the case centered upon the question of the identification of the prisoner. If the testimony of the only witnesses to the homicide is true, it was an unprovoked, heartless murder. There is no contradictory evidence in respect to the way in which the deceased was killed.

We have examined the exception to the reply made by his Honor to the question propounded by the jury after an hour's deliberation, and find no error therein.

The last exception urged by the prisoner's able and faithful counsel relates to the conduct of the jury. In respect thereto his Honor finds the following facts: "The jury, pending the trial, were quartered in the Klondyke Hotel by the officer and kept together there at night and when not attending upon the sessions of the Court; that the alley in which the shooting occurred was right on one side of the hotel, and was the nearest way from the hotel to the privy, and that on two occasions the jury were carried by the officer through the alley to reach the privy for the calls of nature. The first time was on the night after the jury was empaneled and

before any evidence was introduced. The next time was on yesterday, in the day-time, pending the argument. The Court finds that the jury did not, nor did any of them, at any other time visit or go through the alley, and that there were not any remarks made by any one of the jury, nor by the officer attending them, as to the condition or appearance of the alley, and that the jury could see and did see the alley from time to time as they passed along by it going to and returning from the sessions of the Court, but no remarks were made by them or any of them as to the conditions of the alley or appearances therein. That the jury from the hotel windows could see and did see the alley and street along which the accused was alleged to have gone after the shooting. The Court further finds that the jury could and did see the electric light and could and did see to what extent they lighted up the alley and the streets and points at which it was testified the accused was on the night of the killing, but there was no mention of any of these conditions, nor remarks made by the members of the jury to each other, nor to any one else, nor by the officer, nor any discussion by them of any of these conditions or the appearance of the place of the shooting nor any of the environments."

The prisoner, upon these findings of fact, moved the Court to set aside the verdict. Motion denied. Prisoner excepted.

In respect to motions to set aisde the verdicts of the jury for misconduct, the rule which controls this Court is thus stated by *Pearson, C. J.*, in *State v. Tilghman,* 33 N. C., 513 (p. 553): "If the circumstances are such as merely to put suspicion on the verdict, by showing not that *there was* but that there might have been an undue influence brought to bear on the jury because there was opportunity and a chance for it, it is a matter within the discretion of the presiding Judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the

prosecutor or prisoner, or if they be solicited and devised how their verdict should be, or if they have other evidence than that which was offered, in all such cases there has been in contemplation of law no trial, and this Court, as a matter of law, will direct a trial to be had."

This Court held in *State v. Crane,* 110 N. C., 530: "When it appears only that there was an opportunity whereby to influence the jury, but not that the jury was influenced, merely opportunity and chance for it, a new trial is in the discretion of the presiding Judge." *State v. Miller,* 18 N. C., 500.

In *State v. Gould,* 90 N. C., 658, a capital felony, *Mr. Justice Ashe* says: "And even if the circumstances had been such (which was not the case here) as to show that there was an opportunity and chance for exerting an influence upon them, it would have been matter of discretion with the presiding Judge whether he would have granted a new trial." In this case his Honor, while properly declining to hear an affidavit from one of the jurors for the purpose of impeaching the verdict, states that he examined each of the jurors orally in the presence of the prisoner and his counsel, and the record shows that the jury was polled. The presumption is, in favor of the integrity of the jury and their verdict, that they tried the case upon the law and evidence. If it is sought to impeach the verdict, the burden is upon the prisoner to show either that they were improperly influenced or that their conduct was such that as a matter of law there had been "no trial." We construe the findings and action of his Honor to mean that the jury were not influenced in arriving at their verdict by what they saw in regard to the alley and its surroundings. We do not entertain a doubt but that the learned, just and fearless Judge who heard the case and passed upon the motion would have promptly set the verdict aside, regardless of all other considerations than his sense of duty, if he

had even doubted its integrity. We should not hesitate to declare the law, as contended by the prisoner, regardless of this consideration, if we so found it to be. Formerly juries were selected from the vicinage, because of their supposed familiarity with the parties, witnesses and surroundings. It would be impracticable to shut a jury up in a room without light, air or exercise during a long trial, as in this case eight days, to prevent the possibility of their seeing, in passing to and from the court-house or attending a call of nature, something which might affect their minds. Many suggestions readily occur to the mind of conditions and circumstances which *might* affect the minds of jurors which it would be impracticable to make the basis for setting their verdicts aside. The law and its administration are for the practical affairs of life. While it seeks to protect the innocent and surround the accused in the day of his trial with all of the safeguards which experience, humanity and justice demand, it seeks also to deal with men and things in a practical way.

We have given the prisoner's cause a careful, anxious consideration. A jury of his country has found him guilty of an unprovoked murder of a citizen of the State. We find no error in the action of the Court. He has been tried according to the "law of the land." The judgment must be

Affirmed.

MONTGOMERY, J., *dissenting.* I dissent from that part of the opinion of the Court in which it is held that his Honor committed no error in refusing to grant the prisoner a new trial on the ground that the jury were on several occasions allowed to visit the locality where the homicide occurred. A most material question of the trial was the identification of the prisoner. Without the aid of the dying declarations of the deceased the jury would have had difficulty in making that identification. The homicide occurred at night in an

alley of the town of Wadesboro. Some of the witnesses testified that the light in the alley from an electric light was insufficient to disclose the identity of the prisoner; others said that the light was sufficient for that purpose. The jury were allowed, without an order of the Court and without the knowledge of the prisoner, to observe many times the effect of the light upon the point where the homicide occurred.

I am not seeking to disturb the rule, so often laid down by this Court, that it is not sufficient to set aside a verdict that a juror might have been influenced by separation from the others of the jury, or by communications held with others outside, but that there must be evidence that the juror was influenced in his verdict by such conduct. But I do intend to enter my dissent against the conviction of any person of a capital felony in a case where evidence other than that offered on trial in an open court has been received by the jury, as was done in this case.

In *State v. Tilghman*, 33 N. C., at p. 553, *Pearson, J.*, said for the Court: "We take this plain proposition: If the circumstances are such as merely puts suspicion on the verdict by showing not that there was but that there might have been undue influence brought to bear on the jury because there was opportunity and a chance for it, it is a matter within the discretion of the presiding Judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, *or if they have other evidence than that which was offered on the trial* (italics mine), in all such cases there has, in contemplation of law, been no trial; and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner."

It matters not what you may call the observations of the

jurors of the place where the homicide was committed, or for whatever purpose the jury visited that locality, the fact is the effect of those lights upon the points in that alley, which were made important by the testimony, was evidence, and it was, in the nature of things, bound to have influenced the jury in fixing the identification of the prisoner. No person can say that the lights which the jurors saw, on the nights when they were in or near the alley, were the same lights which were there the night of the homicide. And it will not do to say that the prisoner could have shown that the lights were not the same. The answer to that is that he did not know the jurors had been there making observations. That information came after the trial was over.

STATE v. CASTLE.

(Filed December 19, 1903.)

1. EVIDENCE—*Homicide.*

In a prosecution for murder, evidence that the accused, who was a foreman of a lumber camp, had not sent the deceased sufficient dinner on the day of the killing, is irrelevant.

2. CHARACTER (IN EVIDENCE)—*Evidence.*

In a prosecution for murder, evidence that the defendant drank liquor is not admissible, as the character of the defendant was not in evidence, he not being a witness and his character not being provable by particular facts or conduct.

3. HOMICIDE—*Self-defense—Instructions.*

Where, on a prosecution for murder, the court charged that defendant was justified in meeting force with force, it was error to add, "But you are to judge of the force necessary, and not the prisoner," since the jury should merely find whether he did more than a reasonable man should have done.

4. HOMICIDE—*Self-defense.*

On a prosecution for murder, it was error to charge that it was incumbent on defendant to first use gentle and mild means, and that if he used more force than was necessary and the deceased could have been ejected without it, he would be guilty of murder in the second degree, since the instruction made the right of self-defense turn on the necessity for the force used, without reference to whether it reasonably appeared necessary.

5. HOMICIDE—*Murder—Instructions.*

On a prosecution for murder it was error to instruct that if the provocation were great the crime would be but manslaughter, but if slight, and the killing done out of proportion to the provocation it would be murder in the second degree, there being no slight provocation in evidence.

6. HOMICIDE—*Instructions.*

In a prosecution for murder it was error to charge that if defendants went to the room of deceased to discharge them and they entered into a sudden quarrel and killed the deceased men they would be guilty of manslaughter, there being no evidence of a sudden quarrel.

7. HOMICIDE—*Self-defense—Evidence—Burden of Proof.*

In a prosecution for murder, the defense being self-defense, an instruction that the burden is on the defendant to show facts necessary to excuse or mitigate the homicide and that the same must be to the satisfaction of the jury is erroneous, as the defendant is entitled to rely on the evidence of state, if any, to mitigate or excuse the homicide.

INDICTMENT against J. E. Castle and W. E. Garland, heard by Judge *E. B. Jones* and a jury, at April Term, 1903, of the Superior Court of BURKE County. From a verdict of guilty of murder in the second degree and judgment thereon the defendants appealed.

STATE *v.* CASTLE.

Robert D. Gilmer, Attorney-General, for the State.

A. C. Avery, S. J. Ervin and *Edmund Jones,* for the defendants.

CONNOR, J. The defendants were convicted of murder in the second degree and from a judgment upon the verdict appealed to this Court.

The testimony tended to show that the defendant Castle was in charge as local manager of a lumber camp constructed and operated by the William Ritter Lumber Company at the terminus of its railway at Camp Creek in Burke County; that he had charge of the railway and all of the incidental work, including a boarding-house, where the hands ate and slept and in which the homicide occurred. At the time of the homicide there were more than sixty or seventy men in the camp. Forty or fifty of them slept in the main building. They took their supper and breakfast in a hall called the dining-room. There was another room, called the lobby, which was used by the hands as a public sitting-room. The board of the hands was furnished by the lumber company under the supervision and direction of the defendant Castle. The deceased men, Dockery and Fortner, were employed by the lumber company.

John Roberts, a witness for the State, testified that they quit work in the evening at six o'clock; that Dockery stopped at twelve and went into camp. Supper was served about seven o'clock. The camp was in charge of the defendant Castle. Two colored men did the cooking. The sleeping apartments were upstairs. The lower part of the main building was used as a dining-room and a part of it as a lobby. There was a hall upstairs and bed-rooms on either side. The defendant Castle discharged hands for disorder. Each "boss" was held responsible for his hands and had the power to discharge them. The witness had some talk with Castle about

not having dinner that day. He asked who was drinking at the camp, and the witness told him the Fortner boys and Dockery were drinking some. There was a rule that no drinking should be allowed in camp. The witness, under objection, was permitted to say that Castle drank himself, to which the defendant excepted. It was further in evidence that dinner was sent to the hands in the woods, being prepared by the cooks, and that the hands were charged by Castle for the company a stipulated price per meal for their dinner sent them, which was "docked out" of the daily wages of the men. The State proposed to show by John Roberts that sufficient dinner was not sent to his hands on the day of the homicide. The defendant objected; the objection was overruled, and the defendant excepted.

C. H. Buchanan testified that the deceased were drinking before and after supper; that he heard no hollering by them out on the porch, but could hear them cursing all over the lobby, and heard shooting once or twice upstairs. A day or two afterwards he saw where one ball went through the floor of Dockery and Fortner's room into the lobby; heard them cursing about the time they came into supper, using profane and indecent language. They were making a noise, and Castle asked them several times to stop. Castle got the time of the deceased men from Roberts; said he did not see why the boys wanted to do that way; that they could get their money without doing that way; that when Garland came he asked Castle where the boys were and Castle said "upstairs." Castle asked Garland what were Mortimer's orders. Garland said Mortimer's orders were to write out discharges and tell them to go away; said send them away quietly, to deputize all of the men he wanted. Castle asked Garland who would be good men, and he named several. Garland was in the employment of the lumber company. The defendants went to the room of the deceased. Castle had a lantern in his left

hand and an envelope in his right hand. All went upstairs; went into Dockery and Fortner's room. Castle, Garland and Lunsford walked in. Castle walked in first on the right side, then Garland walked in on the left side. Castle handed Dockery an envelope and said: "Here, boys, is your time." Dockery said something; never understood what he said; all stood up. Fortner was sitting on the left of the bed as we went in. Dockery had a knife in his hand—hawk-bill. Fortner had a pistol in his right hand, sitting on the bed with his feet hanging down, holding the pistol with the muzzle towards the door, and as Garland stepped in Fortner turned his pistol up by turning over his hand. Garland grabbed at the pistol and said: "What are you going to do with that pistol?" Fortner arose and grabbed the pistol with both hands, and they entered into a scuffle with the pistol. As Garland took hold of the pistol he raised up. Dockery raised up with his knife and struck at Garland two strokes. Fortner and Garland were struggling over the pistol. The witness thought he cut Garland.

Stokes Pendland testified that he was commissary clerk and was at the camp on the night of the homicide; that Dockery came in about three o'clock and said he quit because they gave or sent out no dinner. The witness asked him if he wanted him to go up to the lobby and have some dinner cooked, and he said he did not want any dinner at that time. He and Riddle went out and took a drink of liquor. Dockery came back and asked the witness to show him a knife. The witness went and got out knives, and he bought one. He said he had not had any dinner, and if Castle charged him with three meals he would kill him at supper. He repeatedly made those threats. In the evening, up to supper time, he was drinking considerably, and said he had two kinds of liquor. He bought a hawk-bill knife and said that was the kind he wanted; that he had used a knife like that before. That

evening about five o'clock the witness went to Riddle and asked him to talk to Dockery and try to get him quiet. He said that Dockery said all he wanted was his money. The witness told him if that was it he would phone Mortimer and see that he got his money. After this conversation Castle came where the witness was. The witness told Castle that he was going to have some trouble, and related the threats that Dockery had said he would kill him if he charged him for three meals. The witness went to supper and warned Castle as to the threats. The gong rang and they started into supper. He saw Fortner; he and Dockery were cursing and using some tough language. We sat down to the table. There were between fifty and sixty of us. Castle asked the boys to keep quiet. After he called the roll he went back into his office. Dockery kept on using the language until all had gone out except a few of us. His language was very vulgar. The witness went back to the commissary; met Fortner and Dockery in the hall. They were taking a drink of whiskey. One of them said: "We have got the whole damned thing bluffed"; think it was Dockery. The witness said: "Boys, if you have got the thing bluffed, I would go up and go to bed." That was the last the witness saw of them. They were shooting and making all sorts of noise upstairs, like knocking over things. The conduct of the deceased men was such as to make the hands leave, and they said if it was such as to be overlooked they would leave.

J. W. Staney testified that he was at supper and heard the deceased use the language stated by other witnesses. He left because of the language they used. He heard a noise upstairs. They came downstairs. Their language was very vulgar.

Zeb Huskins testified that he saw the deceased in the hallway going towards their room. Dockery had a knife and Fortner had a pistol. Fortner said: "I thought you were

that —— John Castle." Dockery caught me by the shoulder and pulled me into the room, and asked me if I had seen anything of that —— Castle; he said if he could see the —— that night, this would do the work for him. He then jumped off the bed and shot down through the floor. Dockery said if he could see the —— he would cut him to death; he said that he had cut one to death and they penned him for that; he said he was going to cut another —— if he could see John Castle that night, and if they penned him for that he was going to quit.

There was much other testimony of the same character. The testimony in regard to the homicide, as gathered from the several witnesses, is substantially as follows: The defendants, together with several others, went to the room of the deceased for the purpose of giving them their time and discharging them. Fortner, with a pistol in his right hand, started to raise up off the bed, and cursed them. Garland grabbed the pistol with his left hand. Fortner raised up straight, so did Dockery, with a knife in his hand, Fortner trying to shoot. Garland was holding the pistol. Castle pulled out his revolver. Dockery made a cut at Garland with his knife, and as he did so Castle shot Fortner. He shot him twice. As he turned Dockery had his knife drawn facing Castle, his arm drawn in a cutting position. Castle shot him twice.

The first exception relates to the testimony of John Roberts that sufficient dinner was not sent to his hands on the day of the homicide. This testimony was clearly irrelevant and was calculated to prejudice the defendant Castle, it being his duty to have dinner sent to the hands, for which, under his direction, they were to be charged on the books of the company, to be deducted from their wages. To charge that he did not send proper dinner or a sufficient quantity of dinner

was calculated to prejudice the jury against him, and should not have been admitted.

The second exception is directed to the testimony that Castle drank liquor. It is not suggested that he was drunk on the night of the homicide. If the purpose of the testimony was to attack his character, and we do not see how it could have been admitted for any other purpose, it was incompetent. He did not put his character in evidence, and certainly the State could not introduce evidence for that purpose upon the question of his guilt. When he went upon the stand he put his general character in issue as a witness, and the State might have proved that such character was not good. It could not, however, introduce evidence of particular facts or conduct on his part. It is well settled that for the purpose of attacking general character the party seeking to do so can only prove common report or reputation. *State v. Laxton,* 76 N. C., 216; *State v. Boswell,* 13 N. C., 209; *State v. Bullard,* 100 N. C., 486; *State v. Horne,* 107 N. C., 810.

"The defendants asked the Court to charge the jury that if when Castle approached the deceased and handed one of them his time and gave notice of discharge they immediately drew deadly weapons and used threatening language or attempted to make a deadly assault on Castle or Garland, who accompanied him, Castle was justified in meeting force with force necessary to protect himself and companion from bodily harm; that if Castle was where he had a right to be, or it was his duty to be, he was not required by the law to retreat to the wall from a deadly assault, though he stepped back when Dockery had drawn a knife within reach of him, and was impeded so he could not get out of Dockery's reach by John Lunsford, he did retreat to the wall."

The Court gave these instructions, adding to each of them the words: "But you are to judge of the force necessary, and not the prisoner," to which the defendants excepted.

We think that the prayers as asked were correct propositions of law in the light of the testimony, and that the Court below should not have added the words complained of. While it is undoubtedly true that the jury are the judges of the force which reasonably appeared necessary to be used to repel the assault, or, to put it more accurately, they are to put themselves in the place of the prisoner and say whether or not, from the testimony the force used was such as a reasonable man under like circumstances would have used, yet it is not correct to leave the guilt or innocence of the defendants to depend upon the absolute necessity of the force used. "Where one is drawn into a combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this he must consider not only the size and strength of his foe, how he is armed, and his threats, but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed. * * * The jury must ascertain the true character of the combat; for if from the nature of the attack there was reasonable ground to believe there was a design to destroy his life or commit a felony upon his person, the killing the assailant would be excusable homicide." *State v. Turpin,* 77 N. C., 477, 24 Am. Rep., 455.

The Court charged the jury: "Yet it was incumbent upon him to use first *gentle* and mild means, and if he and those with him used more force than was necessary, or unreasonable or violent force, such as deadly weapons, and you find they

could have been ejected without such violent force, the defendants would be guilty of murder in the second degree." To this instruction the defendants excepted. The defect in this instruction consists in the fact that the Judge makes the right of self-defense to turn upon the necessity for the force used, without reference to the question whether it reasonably appeared to be necessary to use such force as the defendants resorted to. The right of self-defense depends upon the use of such force as is necessary, or reasonably appears to be necessary, whereas his Honor directed the jury to consider only the question of necessity. We think there is also error in this instruction, because, taking all of the testimony to be true, the doctrine of *molitier manus* does not apply. The defendant Castle had a right to go into the room for the purpose of giving them their time and notifying them of their discharge. All of the testimony shows that as he entered the room these men were armed with deadly weapons, and immediately upon his entering the room the difficulty began. There is no phase of the testimony which tended to show that the defendants could have resorted to gentle and mild means in performing their mission.

His Honor further instructed the jury: "If the provocation be great it will be but manslaughter, but if the provocation be but slight and the killing be done out of all proportion to the provocation it will be murder in the second degree." The error in this instruction consists in assuming that the jury could find that there was slight provocation. If the jury found that there was any provocation it consisted in a deadly assault by the deceased upon the defendants, and it would be difficult to conceive how the jury, in the light of all the evidence, could find that the means used by the defendants was "out of all proportion to the provocation."

He again charged the jury: "If the defendants went to the room of the deceased for the purpose of discharging them, and

not for the purpose of conflict or fight, and they entered into a sudden quarrel and fight and killed Dockery and Fortner, they would be guilty of manslaughter." There is no evidence in this case that the defendants entered into a sudden quarrel with the deceased. Assuming that the jury did find that the defendants went to the room of the deceased for the purpose of discharging them, which was entirely lawful, and not for the purpose of having a conflict or fight, there was no word used from which the jury could infer a sudden quarrel. The testimony tended to show that one of the deceased had a pistol and the other a hawk-bill knife; that when Garland undertook to disarm Fortner of his pistol Dockery attempted to use his knife upon Garland or Castle, while Garland was struggling with Fortner. With these conditions surrounding them, we can see no theory upon which the defendants can be guilty of manslaughter. If the jury found that they went there for a lawful purpose, and in the prosecution of such purpose they were suddenly assaulted in the manner testified to by the witnesses, and they used such force as was or reasonably appeared to them to be necessary, the jury taking into consideration the character of the deceased, the frame of mind in which they had been and were at the time, the threats of one of them, and all the other testimony, we think the defendants were entitled to an instruction that it was excusable homicide.

Of course if the jury should find that the defendants Castle and Garland went there for the purpose of provoking a difficulty, and not for the *bona fide* purpose of discharging their duty, and in the prosecution of such purpose they killed the deceased, they would be guilty of manslaughter at least, and if the jury should further find that the deceased made no assault upon them they would be guilty of murder at least in the second degree.

The defendants further except to his Honor's charge for

that he repeatedly said to the jury that the burden was upon them to prove to their satisfaction the existence of the facts necessary to reduce the grade of the offense or to mitigate or excuse the homicide. Undoubtedly the general rule as stated by his Honor is correct, but we think that he should have gone further and said to the jury that if the facts and circumstances accompanying the homicide were given in evidence by the State's witnesses the defendants were not called upon to introduce other testimony, but could rely upon the State's evidence for mitigation of the grade of the homicide or for an acquittal. *State v. Willis,* 63 N. C., 26.

His Honor said to the jury in conclusion: "But it is incumbent upon the defendants to satisfy you that these circumstances and state of facts have been shown to your satisfaction." We think that this was calculated to leave the impression upon the minds of the jury that the defendants were required to introduce independent evidence to mitigate or excuse the homicide. As we have seen, if there was any evidence in the State's testimony which tended to establish the defense it was the duty of the jury to consider it as tending to sustain the plea of self-defense.

The testimony in this case shows a course of conduct on the part of the deceased which placed the defendant Castle, with the responsibilities resting upon him and his duties not only to his employer but to the large number of men under his charge, in an exceedingly embarrassing position. He was in charge of a lumber camp of some fifty or sixty men. It was absolutely necessary to a discharge of his duty both to his employer and the men that such conduct, as is testified to by the State's witnesses, on the part of the deceased should be suppressed, and that persons conducting themselves as did the deceased should be discharged, and if the jury found, and we think they would have been fully justified in finding, that he was endeavoring to discharge his duty, and in doing

so the conduct of the deceased was such as to create in his mind a reasonable apprehension that they would execute their threats and continue in their course of conduct, he was not only justified but it was his duty to use such means as were necessary to rid the camp of such persons. It certainly was his duty to discharge them, and to do so promptly he had a right to go to their room for that purpose, and in view of what had occurred and the conduct of the deceased in the dining-room and after they had gone to their room, it was but common prudence for him to carry a sufficient number of men to prevent or repress any further violence. His language upon entering the room, "Boys, here is your time," is entirely consistent with the lawful purpose on his part. In the deadly encounter which immediately followed, and in which the homicide was committed, we think that the defendants were entitled to the instructions asked by their counsel, and that the modification of them was calculated to prejudice them. Upon the whole record we think the defendants are entitled to a

New trial.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

STATE v. SAWYER, *Attorney-General,* for State; *W. J. Leary, Sr.,* for defendant. Affirmed.

STATE v. PAYNE, *Attorney-General,* for State; *Sawyer* and *Leary,* for defendant. Affirmed.

STATE v. LEWIS, *Attorney-General,* for State; *W. A. Dunn,* for defendant. Affirmed.

REED v. SUMNER, *Cowper* and *Barnes,* for plaintiff; *Winborne & Lawrence,* for defendant. Affirmed.

LEIGH v. MFG. CO., *Mason* and *Daniel,* for plaintiff; *Day & Bell, Battle & Mordecai* and *Calvert,* for defendant. Petition of defendant to rehear dismissed.

ATKINSON v. RICKS, *Winborne & Lawrence,* for plaintiff; *Mason, Harris* and *Barnes,* for defendant. Motion for new trial denied. Judgment below affirmed.

HAWKS v. HAWKS, *Pittman & Kerr,* for plaintiff; *Green* and *Polk,* for defendant. Affirmed.

FRAZIER v. FRAZIER, *Lindsay,* for plaintiff; *Morrill,* for defendant. Affirmed. (CONNOR, J., having been of counsel, did not sit.)

HARRINGTON v. RAWLS, *Jarvis & Blow,* for plaintiff; *Fleming & Moore* and *Skinner & Whedbee,* for defendant. Affirmed.

TAYLOR v. MCIVER, *W. W. Clark,* for plaintiff. Motion to docket and dismiss defendant's appeal under Rule 17 allowed.

STATE v. LONGMIRE, *Attorney-General,* for State; *Piltman & Kerr,* for defendant. Affirmed.

HOUSE v. RAILROAD, *Spruill,* for plaintiff; *Day & Bell,* for defendant. Dismissed for failure to print brief.

BREWER v. BATCHELOR, *Jacob Battle* and *Shepherd & Shepherd,* for plaintiff; *Spruill,* for defendant. Affirmed.

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

STATE v. ARNETT *et al., Attorney-General,* for State; *J. D. Kerr,* for defendant. Affirmed.

HOWARD v. TELEGRAPH CO., *D. L. Ward* and *T. C. Wooten,* for plaintiff; *W. W. Clark* and *F. H. Busbee & Son,* for defendant. Affirmed.

HAWKINS v. LUMBER CO., *D. L. Ward* and *Isler* and *Shaw,* for plaintiff; *Simmons & Ward* and *T. C. Wooten,* for defendant. Affirmed.

MFG. CO. v. LUMBER CO., *Land & Cowper,* for plaintiff. Dismissed for failure to print brief.

STANLY v. RASBERRY, *Pollock & Clark,* for plaintiff; *Rouse & Ormond,* for defendant. Affirmed.

BARROW v. COTTON MILLS, *Douglass & Simms,* for plaintiff; *Battle & Mordecai,* for defendant. Affirmed.

YOUNG v. RAILROAD, *Douglass & Simms,* for plaintiff; *Day & Bell* and *Womack,* for defendant. Affirmed.

MOTZNO v. RAILROAD, *Munroe,* for defendant. Affirmed.

MONTAGUE v. WILLIAMS, *Harris,* for plaintiff; *Bledsoe,* for defendant. Affirmed upon the authority of *Stanly v. Baird,* 118 N. C., 75.

CHEMICAL CO. v. LEACH, *Cook,* for plaintiff; *McCormick,* for defendant. Appeal dismissed.

MOORE v. BECTON, *Sinclair,* for plaintiff; *Cook,* for defendant. Affirmed.

PATTERSON v. WHEELER, *Sinclair,* for plaintiff; *Broadfoot,* for defendant. Affirmed.

CARTER v. COMMISSIONERS, *Sinclair,* for plaintiff; *Rose,* for defendant. Affirmed.

JONES v. RAILROAD, *Sinclair,* for plaintiff; *Rose,* for defendant. Affirmed.

TEW v. BLUE, *Cook,* for plaintiff. Motion to docket and dismiss under Rule 17 allowed.

CAMPBELL v. LIFE ASSO., *McIntyre & Lawrence,* for plaintiff. Motion to docket and dismiss under Rule 17 allowed.

McINTYRE v. LIFE ASSO., *McIntyre & Lawrence,* for plaintiff. Motion to docket and dismiss under Rule 17 allowed.

STATE v. RATLIFF, *Attorney-General* and *McLendon,* for State; *Bennett,* for defendant. Affirmed.

STATE v. MARSH, *Attorney-General,* for State; *Redwine,* for defendant. New trial.

HILLIARD v. SIKES, *Adams & Jerome* and *Lemmond,* for plaintiff; *Redwine & Stack* and *Armfield,* for defendant. Affirmed.

SHUTE v. COTTON MILLS, *Redwine,* for plaintiff; *Jerome,* for defendant. Dismissed for failure to file printed record and brief.

HEGWOOD v. JOHNSON, *Bynum,* for plaintiff; *Morehead,* for defendant. Affirmed.

FAY v. CAUSEY, *Morehead* and *Scott,* for plaintiff; *Barringer,* for defendant. Affirmed.

COZART v. RAILROAD, *Kitchin & Carlton,* for plaintiff; *Guthrie,* for defendant. Affirmed.

BRUMMETT v. LIFE ASSO., *Shaw & Shaw,* for plaintiff. Motion to docket and dismiss under Rule 17 allowed.

FLEMING v. RAILROAD, *Nicholson,* for plaintiff; *Caldwell,* for defendant. Affirmed.

BURKS v. TEL. CO., *Wright,* for plaintiff; *Jones & Tillett,* for defendant. Affirmed.

BUMGARDNER v. RAILROAD, *Furches, Coble & Nicholson,* for plaintiff; *Caldwell,* for defendant. Affirmed.

BURKE v. RAILROAD, *Furches, Coble & Nicholson,* for plaintiff; *Caldwell,* for defendant. Affirmed.

RAPER v. STIVERS, *Taylor & Wilson,* for plaintiff; *Barringer,* for defendant. Affirmed.

SPRINKLE v. WELLBORN, *Finley,* for plaintiff; *Barber,* for defendant. Defendant's petition to rehear dismissed.

MARION v. BANK, *Carter,* for plaintiff; *Holcomb* for de-

fendant. Affirmed on the authority of *Jones v. Buxton,* 131 N. C., 285.

MAIN v. QUICKEL, *Wetmore,* for plaintiff; *Quickel,* for defendant. Affirmed.

FURR v. RAILROAD, *McCall,* for plaintiff; *Bason,* for defendant. Affirmed.

MOSES v. RAILROAD, *Burwell & Cansler,* for plaintiff; *Bason,* for defendant. Affirmed.

MCMANUS v. RAILROAD, *Bason,* for defendant. Dismissed for failure to print briefs and for want of bond.

THOMAS v. THE LOUISE MILLS, *Montgomery & Crowell,* for plaintiff; *Jones & Tillett,* for defendant. Affirmed.

RUTLEDGE v. COTTON MILLS, *Mangum,* for plaintiff; *Mason,* for defendant. Affirmed.

HURLEY v. RAILROAD, *Mangum,* for plaintiff; *Busbee & Son,* for defendant. Affirmed.

BLAND v. PURCELL, *Clarkson & Duls,* for plaintiff; *McCall & Nixon,* for defendant. Affirmed by a majority of the Court. CONNOR, J., dissenting. (WALKER, J., did not sit.)

TEASTER v. LUMBER CO., *Lovill,* for plaintiff; *Newland,* for defendant. Motion to reinstate appeal denied.

HUITT v. RAILROAD, *Self & Whitener,* for plaintiff; *Erwin,* for defendant. Affirmed.

HAYES v. STAFFORD, *Linney,* for plaintiff; *Bower,* for defendant. Appeal of defendant dismissed for failure to file record at proper term and for failure to file brief in time.

MILLER v. MCGUIRE, *Linney,* for defendant. Motion to docket and dismiss under Rule 17 allowed.

IN RE ENTRIES OF DRURY, *Perkins* and *Justice,* for appellant; *Avery,* for appellee. Affirmed.

RICE v. POTTER, *Moore,* for plaintiff. Dismissed for failure to print record.

CARMICHAEL v. EVERETT, *Pou & Fuller,* for plaintiff; *Gash,* for defendant. Dismissed for failure to file brief.

RANKIN v. HOTEL CO., *Merrick & Barnard,* for plaintiff; *Moore & Rollins,* for defendant. Affirmed on authority of *Baxter v. Baxter,* 77 N. C., 118.

WILD v. ROBERTS, *Charles A. Moore,* for defendant. Motion to docket and dismiss plaintiff's appeal under Rule 17 allowed.

KEENER v. KELLY, *Shepherd & Shepherd,* for plaintiff; *Ray* and *Sisk,* for defendant. Affirmed on authority of *Barcello v. Hapgood,* 118 N. C., 712.

MOODY v. PHILLIPS, *Kelly* and *Jones & Johnston,* for plaintiff; *Ray,* for defendant. Affirmed on authority of *Murchison v. Plyler,* 87 N. C., 79, and *Stern v. Lee,* 115, N. C., 428.

BANK v. MANUFACTURING CO., *Crawford & Hanna,* for plaintiff; *Ferguson,* for defendant. Affirmed.

OLMSTED v. DRURY, *J. T. Perkins, S. J. Ervin* and *E. J. Justice,* for plaintiff; *Avery & Avery* and *Avery & Ervin,* for the defendant. For the reasons given in *Olmsted v. Smith,* at this term, the judgment in this case is reversed.

AMENDMENTS TO RULES 28, 52 AND 53.

ADOPTED OCTOBER 28, 1903.

(SEE 128 N. C., 633.)

28. *Printing Records—What to be Printed—Pauper Appeals.*

Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals, and in these latter the Court desires the counsel for the appellant to furnish a sufficient number of printed or typewritten briefs for the use of the Court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on. Should the appellant gain the appeal the cost of the same shall be taxed against the appellee.

The printed transcript shall be in the order required by Rule 19 (1), and shall contain the marginal references and index required by Rule 19 (2) and 19 (3), though, for economy, the marginal references in the manuscript may be printed as subheads in the body of the record and not on the margin. The transcript shall be printed immediately after docketing the same unless it is sent up ready printed.

52. *Petition to Rehear—When Filed.*

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the Court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the Justices to whom it is submitted under Rule 53, such Justices may, upon such terms as they see fit, make an order restraining the issuing of an execution or the collection and payment of the same until the next term

of said Court, or until the petition to rehear shall have been determined.

53. *Petition to Rehear—What to Contain.*

The petition must assign the alleged error of law complained of; or the matter overlooked; or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court who have no interest in the subject matter and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall endorse upon the petition the names of two Justices, neither of whom dissented from the opinion, to whom the petition shall be sent by the Clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been two dissenting Justices it shall be sufficient for the petitioner to designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed. The Clerk shall endorse on the petition the date on which it was received, and it shall be delivered by him to one of the Justices designated by the petitioner. There will be no oral argument before the Justice or Justices thus designated, before it is acted on by them, and if they order the petition docketed there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted upon the record at the former hearing, the printed

petition to rehear and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all the points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed notice shall at once be given to counsel on both sides by the Clerk of this Court.

INDEX.

A

ABANDONMENT.

Where on appeal an exception is not referred to in the brief of appellant, it will be taken as abandoned. *State v. Register*, 747.

ABATEMENT. See "Pleadings"; "Jurisdiction."

Where a mortgagee dies pending a suit to foreclose a mortgage, the heirs or devisees of such mortgagee are necessary parties. *Stancill v. Spain*, 76.

An objection to venue is waived unless taken in apt time by a plea in abatement. *State v. Holder*, 709.

In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined. *Rand v. Lumber Co.*, 433.

A motion to dismiss an action for trespass for failure to make an administrator a party thereto cannot be made in the supreme court. *Rowe v. Lumber Co.*, 433.

An objection to the venue in that a case had been improperly removed from one county to another must be taken by a plea in abatement, not by a motion in arrest of judgment. *State v. Ledford*, 714.

ACCESSORY. See "Homicide."

Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a juror selected from a special venire ordered in the case. *State v. Register*, 747.

ACCOMPLICES. See "Homicide."

A person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious in so doing. *State v. Register*, 747.

ACKNOWLEDGMENTS. See "Deeds."

Where plaintiff executed a deed to a third person and accepted a mortgage from defendant to secure the purchase money, the plaintiff, acting as a justice of the peace, was not incompetent to acknowledge a transfer by such third person of his deed to defendant. *Joines v. Johnson*, 487.

ACTIONS. See "Limitations of Actions."

In an action for damages caused by delay in shipment of goods it is immaterial whether the action is brought *in assumpsit*, upon a breach of contract or in case for the violation of a common-law duty, or on a tort based on a contract. *Parker v. Railroad*, 335.

Where a defendant sets up a counter-claim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a non-suit. *Olmsted v. Smith*, 584.

A judgment by default and inquiry merely admits a cause of action, and carries only nominal damages and costs; the burden of proving any damages beyond a penny being still upon plaintiff. *Osborn v. Leach*, 428.

ACTS. See "The Code"; "Statutes."

1869-'70, ch. 14. Limitations of Actions. *Farrar v. Harper*, 71.
1874-'75, ch. 255. Licenses. *In re Burgwyn*, 115.
1883, ch. 146. Licenses. *In re Burgwyn*, 115.
1883 (Private), ch. 111, sec. 37. Railroads. *Railroad v. Platt Land*, 266.
1885, ch. 68. Dueling. *State v. Fritz*, 725.
1885, ch. 265. Corporations. *Travers v. Railroad*, 322.
1885, ch. 359. Homestead. *Farrar v. Harper*, 71.
1887, ch. 389. Abatement. *Rowe v. Lumber Co.*, 433.
1887, ch. 17. Homestead. *Farrar v. Harper*, 71.
1889, ch. 243. Due Process of Law. *Parish v. Cedar Co.*, 478.
1891, ch. 29. Gaming. *State v. Morgan*, 743.
1891, ch. 91. Married Women. *Harvey v. Johnson*, 353.
1891, ch. 176. Railroads. *Railroad Co. v. Platt Land*, 266.
1891 (Private), ch. 135, sec. 16. Eminent Domain. *Railroad Co. v. Platt Land*, 266.
1891, ch. 83. Guardian and Ward. *Duffy v. Williams*, 195.
1893, ch. 453. Assignments. *Sutton v. Bessent*, 559.
1893, ch. 6. Nonsuit. *Olmsted v. Smith*, 584.
1893, ch. 6. Limitations of Actions. *Miller v. Coxe*, 578.
1893, ch. 148. Railroads. *Railroad v. Newton*, 132.
1893, ch. 22. Boundaries. *Parker v. Taylor*, 103.
1895, ch. 165. Eminent Domain. *Hodges v. Telegraph Co.*, 225.
1895, ch. 285. Larceny. *State v. Hullen*, 656.
1895, ch. 435. Attachment. *Evans v. Alridge*, 378.
1897, ch. 109. Nonsuit. *Bivings v. Gosnell*, 574.
1899, ch. 290. Stock Law. *Harper v. Commissioners*, 106.
1900, ch. 17. Intoxicating Liquors. *In re Burgwyn*, 115.
1901, chs. 28 and 29. Superior Courts. *State v. Lew*, 664.
1901, ch. 2, sec. 95. Corporations. *Travers v. Railroad Co.*, 322.

ACTS—*Continued.*

1901, ch. 9. Licenses. *In re Burgwyn*, 115.
1901, ch. 612. Homestead. *Farrar v. Harper*, 71.
1903, ch. 554. Stock Law. *Harper v. Commissioners*, 106.
1901, ch. 2, sec. 88. Receivers. *Graham v. Carr*, 449.
1903, ch. 533. Superior Courts. *State v. Lew*, 664.
1903, ch. 56. Stock Law. *Harper v. Commissioners*, 106.
1903, ch. 99. Remainder. *Smith v. Gudger*, 627.
1903 (Private), chs. 85 and 86. *Wadsworth v. Concord*, 581.
1903, ch. 223. Licenses. *In re Burgwyn*, 115.
1903, ch. 99. Remainders. *Hodges v. Lipscomb*, 199.
1903, ch. 697. Physicians and Surgeons. *State v. Biggs*, 729.

ADJOINING LAND OWNERS. See "Processioning."

Where the damage caused by an excavation might have been reasonably anticipated, the owner of land upon which the excavation is made is liable therefor, though the negligence was that of an independent contractor. *Davis v. Summerfield*, 325.

The employment of an independent contractor to make an excavation adjacent to an abutting owner's wall does not relieve the proprietor from the obligation to give the adjacent owner timely notice of the nature and extent of the intended excavation. *Davis v. Summerfield*, 325.

ADMISSIONS. See "Evidence."

In this action against a railroad company to recover for personal injuries, the answer introduced as evidence does not admit that the decedent could not see the approaching train and was unaware of its approach. *Pharr v. Railroad*, 610.

Where the description of land in a mortgage is ambiguous, admissions by the deceased mortgagee are competent to show that certain land was not intended to be included in the mortgage. *Stancill v. Spain*, 76.

The admissions of a prosecuting witness are admissible against him on another trial for the same or any other offense. *State v. Simpson*, 676.

Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. *State v. Simpson*, 676.

ADVERSE POSSESSION. See "Color of Title."

The possession of the mortgagor or those holding under him is not adverse to the mortgagee. *Stancill v. Spain*, 77.

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them

ADVERSE POSSESSION—*Continued.*

by adverse possession may be tacked to that of the husband. *Atwell v. Shook*, 387.

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession is immaterial. *Atwell v. Shook*, 387.

AFFIDAVIT. See "Divorce."

AFFRAY.

The fighting of two persons in the presence of seven persons constitutes an affray. *State v. Fritz*, 725.

AGENCY.

Where a husband is in possession of land as agent of his wife, his declarations to strangers in regard to the boundaries of her land are not admissible against her. *Perkins v. Brinkley*, 348.

Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. *State v. Neal*, 689.

ALIMONY. See "Divorce."

AMENDMENTS. See "Pleadings."

In an action to condemn land for railroad purposes the court may allow an amendment to the complaint of a better profile. *Railroad v. Newton*, 132.

The failure of a complaint in an action for non-delivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action, which may be cured by amendment. *Blalock v. Clark*, 306.

A complaint stating that damage by fire was caused by the careless and negligent failure to provide the engine with spark-arresters may be amended by alleging the negligence to be that combustible matter was allowed to accumulate on the right of way. *Simpson v. Lumber Co.*, 95.

APPEAL. See "Case on Appeal"; "Briefs."

An objection to a certain instruction on the ground that there was no evidence to support it cannot be reviewed, unless all of the evidence is contained in the record. *Atwell v. Shook*, 387.

The question of the measure of damages does not arise on appeal

APPEAL—*Continued.*

from the sustaining of a demurrer to the evidence for failure to show a cause of action. *Blalock v. Clark*, 306.

The ruling of the trial court affirming the clerk in ordering actual partition of land is not reviewable. *Navigation Co. v. Worrell*, 93.

An order appointing commissioners in a partition proceeding is interlocutory, and an appeal therefrom is premature. *Navigation Co. v. Worrell*, 93.

In a criminal case an appellant must tender to the solicitor of the district where the case is tried a statement of the case on appeal for acceptance or rejection, and the acceptance of service of such statement by an attorney appearing for the private prosecutor is insufficient. *State v. Clenny*, 662.

Where a judgment for taxes includes the poll tax of one not a party to the action, this portion will be stricken out on appeal. *Wilmington v. McDonald*, 548.

An exception that "the court erred in rendering said judgment" is too general to be considered on appeal. *Wilmington v. McDonald*, 548.

Upon a rehearing the supreme court will not consider any point not certified as erroneous by counsel making the certificate. *Kerr v. Hicks*, 175.

Where the plaintiff excepts to a compulsory reference, an objection taken for the first time on appeal to the technical form of asking submission of issues arising "on the report" instead of "on the pleadings" will not be considered. *Kerr v. Hicks*, 175.

Where the defendant, in an appeal from a justice of the peace, fails to appear in the superior court, having answered and raised a material issue, no judgment can be entered against him without a trial. *Barnes v. Railroad*, 130.

The clerk of the superior court has no jurisdiction of an action to sell property for reinvestment, etc., under acts 1903, ch. 99, but when carried to the superior court on appeal it will be retained for a hearing. *Smith v. Gudger*, 627.

Where there is no exception to the sufficiency of the evidence and the evidence is not set out in the record, the sufficiency thereof will not be considered on appeal. *State v. Tyson*, 692.

An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom, though a plea in bar was filed by the defendant. *Railroad v. Newton*, 132.

Where the parties fail to agree on a case on appeal, and the appel-

APPEAL—*Continued.*

lant fails for two months to send the papers to the trial judge, the delay not being satisfactorily accounted for, a motion for *certiorari* to bring up the case will be denied. *Stroud v. Telegraph Co.*, 253.

Where the record and briefs are not printed within the time prescribed by supreme court rules 30 and 34, the appeal will be dismissed. *Stroud v. Telegraph Co.*, 253.

Where the record does not show what part of a paragraph of the pleadings was offered in evidence, an exception thereto is too indefinite and will not be considered on appeal. *Clegg v. Railroad*, 303.

An appeal will be dismissed for failure of appellant to file printed brief on Tuesday of the week preceding the call of the district to which the cause belongs, unless, for good cause shown, the court shall give further time to print the brief. *Calvert v. Carstarphen*, 25.

ARGUMENTS OF COUNSEL.

An exception to the remarks of counsel made during the argument must be taken before verdict. *State v. Tyson*, 692.

ARREST.

A policeman who makes an arrest without a warrant outside the corporate limits of a town for the breach of an ordinance is guilty of an assault. *Sossamon v. Cruse*, 470.

The use of a pistol in attempting to arrest for a misdemeanor is excessive force. *Sossamon v. Cruse*, 470.

Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. *Sossamon v. Cruse*, 470.

Where an action is for malicious prosecution and illegal arrest, and an issue is submitted as to each, two issues should be submitted as to damages. *Kelly v. Traction Co.*, 418.

ARREST OF JUDGMENT.

In a prosecution for fornication and adultery one defendant may be convicted and the other acquitted. *State v. Simpson*, 676.

ARSON.

On a prosecution for arson a witness testified that the evening before the night of the burning the children of defendant came to her house and borrowed matches, and that the morning after the fire she stated to defendant that she thought she furnished

ARSON—*Continued.*

the matches which burned the barn, whereupon he said that if she thought so not to say anything about it; that witness and the owner of the barn were not friendly; and that about a week before the burning defendant came to witness' house to get some tobacco, and witness said she had none, and he asked her why she did not get some from the owner of the barn and never pay for it, and stated that the owner was getting rich too fast, and that he had a fine barn, but that it would not stand two years, such evidence was competent. *State v. Ledford*, 714.

ASSAULT.

A person indicted for dueling may be convicted of an assault. *State v. Fritz*, 725.

A policeman who makes an arrest without a warrant outside the corporate limits of a town for the breach of an ordinance is guilty of an assault. *Sossamon v. Cruse*, 470.

The use of a pistol in attempting to arrest for a misdemeanor is excessive force. *Sossamon v. Cruse*, 470.

Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. *Sossamon v. Cruse*, 470.

In an action against a carrier for failure to protect a passenger against an assault at a station, the evidence by a witness that he told the person assaulted immediately after the assault that an employee of the carrier took part in the assault is competent as part of the *res gestæ*. *Seawell v. Railroad*, 515.

ASSIGNMENTS. See "Negotiable Instruments."

Where there is no evidence of the loss of a note, or that an alleged assignment thereof was in the handwriting of the payee, parol evidence is incompetent to show the assignment. *Stancill v. Spain*, 76.

Where a *feme sole* assigns stock in blank and after marriage new stock is issued to her, and she assigns the same to the same parties without assuming control thereof, such assignment is valid without the consent of the husband. *Cox v. Dowd*, 537.

Where a person assigns stock in blank and allows another person to use the same as collateral, without any knowledge on the part of the person to whom given as collateral as to any conditions relative to the assignment, is not released by an extension of time in payment of the debt for which it is collateral. *Cox v. Dowd*, 537.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Where it is discretionary with the trustee in a deed of trust as to the time of the sale of property therein assigned, the same may be sold, though the debts secured are barred by the statute of limitations. *Robinson v. McDowell*, 182.

A personal representative cannot sell land to pay debts barred by limitation. *Robinson v. McDowell*, 182.

The assignee in an assignment for the benefit of creditors, the grantor in the assignment having retained his homestead, may, upon the death of the grantor, sell the homestead to pay the debts, though such debts are barred by limitation. *Robinson v. McDowell*, 182.

A creditor whose debt is secured by a deed of trust is entitled to payment in preference to another creditor who has a subsequent deed of trust, the funds being in the hands of a trustee under a subsequent assignment for the benefit of creditors. *Sutton v. Bessent*, 559.

An assignment for the benefit of creditors, preferring a claim void for want of consideration, does not provide for a real preference within the act of 1893, requiring the filing of a schedule of preferred debts. *Sutton v. Bessent*, 559.

An assignment for the benefit of creditors, preferring a creditor secured by a deed of trust on the same property, does not provide for a real preference within the act of 1893, requiring the filing of a schedule of preferred debts. *Sutton v. Bessent*, 559.

Part payment by an assignee in bankruptcy of a debt referred to in the assignment does not arrest the running of the statute of limitations against the debt. *Robinson v. McDowell*, 182.

Where the grantor, after making an assignment for the benefit of creditors, dies, his personal representative and the trustee may join in a special proceeding before the clerk to sell the real estate to pay debts. *Robinson v. McDowell*, 182.

Where the trustee in an assignment for the benefit of creditors and the administrator of the grantor, having joined in a proceeding to sell land, allege that the grantor died seized of the land in fee, the title of the purchaser is not affected thereby. *Robinson v. McDowell*, 183.

A debtor sold to a creditor goods found to be of the value of $227 in payment of a claim of $240. Subsequently the debtor made an assignment for the benefit of creditors, reserving his right to exemptions. In an action by the assignee against the creditor a judgment for the defendant was not error, as the sale was good as between the debtor and creditor, and if plaintiff had

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Continued.*
been permitted to recover the goods it would merely be for the benefit of the debtor. *Murray v. Williamson*, 318.

ATTACHMENT.

In an attachment by a vendee against the vendor of goods, the vendor making no defense, the only issue between the vendee and an interpleader is whether the interpleader is the owner and entitled to the possession of the goods. *Manufacturing Co. v. Tierney*, 630.

Where a non-suit is taken upon a demurrer to the evidence, a new action may be brought within one year. *Evans v. Alridge*, 378.

In attachment, an interpleader having introduced a bill of lading for the property and draft attached properly endorsed, the presumption is that the interpleader is a purchaser for value without notice. *Manufacturing Co. v. Tierney*, 630.

In attachment the burden of showing title to property is on the interpleader. *Manufacturing Co. v. Tierney*, 630.

Where ancillary proceedings of attachment are brought with the main action, and the attachment is not discharged, it is not error to condemn the attached property for sale to pay the judgment, as the sheriff would be required to sell the same upon issuance of execution. *Manufacturing Co. v. Steinmetz*, 192.

Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft and he cannot retain the price of the goods on account of a debt due him from the consignor. *Manufacturing Co. v. Tierney*, 630.

The failure to certify to the clerk of the superior court of the county in which the land lies a levy thereon, in an attachment proceeding, does not invalidate such levy. *Evans v. Alridge*, 378.

In an action to recover land purchased under a judgment recovered against defendant's non-resident grantor, plaintiff could not recover, in the absence of proof of the grantor's personal appearance or publication of summons after attachment. *Evans v. Alridge*, 378.

A non-resident corporation, against which a default judgment was obtained after service by publication, is not entitled to have the default judgment opened on the ground that it had no notice of the pendency of the suit unless it shows that it exercised due diligence. *Turner v. Machine Co.*, 381.

ATTORNEY AND CLIENT.

A non-resident attorney in the state to represent his clients in a matter pending in the federal court is not privileged from service of summons. *Greenleaf v. Bank*, 292.

The allowance of commissions and counsel fees to a receiver by the superior court is *prima facie* correct, and the supreme court will alter the same only when they are clearly inadequate or excessive. *Graham v. Carr*, 449.

Where an attorney was employed by the heirs of a decedent under a contract that he should receive a certain portion of any sums which he might recover from the estate of the decedent, he was not entitled to anything when he recovered nothing for the heirs, though he may have been prevented by them from prosecuting their claim, his remedy being by an action for damages. *Johnston v. Cutchin*, 119.

B

BANKS AND BANKING. See "Negotiable Instruments."

Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft and he cannot retain the price of the goods on account of a debt due him from the consignor. *Manufacturing Co. v. Tierney*, 630.

BILLS OF LADING. "See Carriers."

A common carrier cannot, by inserting in a bill of lading "subject to delay," contract against damages caused by its negligence. *Parker v. Railroad*, 335.

In attachment, an interpleader having introduced a bill of lading for the property and draft attached properly endorsed, the presumption is that the interpleader is a purchaser for value without notice. *Manufacturing Co. v. Tierney*, 631.

Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft and he cannot retain the price of the goods on account of a debt due him from the consignor. *Manufacturing Co. v. Tierney*, 631.

BOUNDARIES. See "Deeds."

Where the calls in a deed are ambiguous or uncertain, it is a question for the jury to decide what was meant. *Rowe v. Lumber Co.*, 433.

Where a deed calls for the mouth of a stream emptying into a

BOUNDARIES—*Continued.*

swamp, the location thereof should be left to the jury. *Rowe v. Lumber Co.*, 433.

Where a deed calls for a swamp and thence with the run of said swamp, the first call must go to the *run* of the swamp and not terminate at the edge of the same. *Rowe v. Lumber Co.*, 433.

Where a call in a deed terminates at a swamp, the question whether the edge or run of the swamp is meant is for the jury. *Rowe v. Lumber Co.*, 433.

Where no evidence is offered as to when a map found among the grantor's books was made, or that it was in existence and referred to by the parties at the execution of the deed, it is inadmissible to show the land included in the deed. *Perkins v. Brinkley*, 348.

Where a survey of land is made in contemplation of a division by deed, the line marked on the survey does not control the calls in deeds subsequently made, in case of a variance, in the absence of fraud or mistake. *Elliott v. Jefferson*, 207.

In a special proceeding to determine boundary, where the defendant raises no issue of title and takes no appeal, the judgment of the clerk determining the boundary is *res judicata* in a subsequent action between the parties for cutting timber beyond the boundary so established. *Parker v. Taylor*, 103.

BRIEFS. See "Appeal."

Where on appeal an exception is not referred to in the brief of appellant, it will be taken as abandoned. *State v. Register*, 747.

An appeal will be dismissed for failure of appellant to file printed brief on Tuesday of the week preceding the call of the district to which the cause belongs, unless, for good cause shown, the court shall give further time to print the brief. *Calvert v. Carstarphen*, 25.

BURDEN OF PROOF.

A carrier, though accepting a shipment under a contract, "subject to delay," has the burden of showing the exercise of due diligence to avoid delay in carrying and delivering the goods. *Parker v. Railroad*, 336.

In attachment the burden of showing title to property is on the interpleader. *Manufacturing Co. v. Tierney*, 630.

In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the state to show beyond a reasonable doubt the intent to defraud. *State v. McDonald*, 680.

BURDEN OF PROOF—*Continued.*

A judgment by default and inquiry merely admits a cause of action, and carries only nominal damages and costs; the burden of proving any damages beyond a penny being still upon plaintiff. *Osborn v. Leach,* 428.

In a prosecution for murder, the defense being self-defense, an instruction that the burden is on the defendant to show facts necessary to excuse or mitigate the homicide and that the same must be to the satisfaction of the jury is erroneous, as the defendant is entitled to rely on the evidence of state, if any, to mitigate or excuse the homicide. *State v. Castle,* 770.

BURGLARY. See "Intent."

A conviction on an indictment for breaking and entering a dwelling with the intent to commit a felony will sustain a plea of former jeopardy on an indictment for burglary based on the same facts. *State v. Staton,* 642.

The bill of indictment for burglary in this case sufficiently charges the intent with which the breaking was done. *State v. Staton,* 642.

The objection that there is not sufficient evidence of the intent with which the defendant entered a dwelling must be taken before verdict. *State v. Staton,* 642.

C

CANCELLATION OF INSTRUMENTS. See "Fraud."

The bare fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in the deed. *Hart v. Cannon,* 10.

CARRIERS. See "Contributory Negligence"; "Damages"; "Negligence"; "Railroads."

The Code, sec. 1967, allowing a carrier five days within which to ship goods, does not relieve it from its common-law liability for loss caused by unreasonable delay in the shipment thereof. *Parker v. Railroad,* 336.

A common carrier cannot, by inserting in a bill of lading "subject to delay," contract against damages caused by its negligence. *Parker v. Railroad,* 335.

In an action for damages for refusal to allow a person with a ticket to board a train, the trial court properly refused to instruct that the conductor, in refusing, might consider that the same person had given him trouble at other times. *Story v. Railroad,* 39.

CARRIERS—*Continued.*

In this action against a railroad company to recover for personal injuries, the answer introduced as evidence does not admit that the decedent could not see the approaching train and was unaware of its approach. *Pharr v. Railroad,* 610.

A railroad company must notify passengers of danger if the same is or should be known to its employees. *Penny v. Railroad,* 221.

In an action for damages for delay in shipment of perishable fruit a newspaper published at the destination is admissible as proving negligence of the carrier, under an agreement permitting the use of copies of the paper on the question of the condition of the market and market value. *Parker v. Railroad,* 335.

In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. *Story v. Railroad,* 59.

In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, evidence that he was on the train intoxicated at another time is not competent. *Story v. Railroad,* 59.

A carrier, though accepting a shipment under a contract, "subject to delay," has the burden of showing the exercise of due diligence to avoid delay in carrying and delivering the goods. *Parker v. Railroad,* 336.

In an action against a carrier for failure to protect a passenger against an assault at a station, the evidence by a witness that he told the person assaulted immediately after the assault that an employee of the carrier took part in the assault is competent as part of the *res gestæ. Seawell v. Railroad,* 515.

CASE ON APPEAL. See "Appeals"; "Briefs."

In a criminal case an appellant must tender to the solicitor of the district where the case is tried a statement of the case on appeal for acceptance or rejection, and the acceptance of service of such statement by an attorney appearing for the private prosecutor is insufficient. *State v. Clenny,* 662.

The successful party on appeal from the superior court is entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. *Dobson v. Railroad Co.,* 624.

Where the parties fail to agree on a case on appeal, and the appellant fails for two months to send the papers to the trial judge, the delay not being satisfactorily accounted for, a motion for

CASE ON APPEAL—*Continued.*

certiorari to bring up the case will be denied. *Stroud v. Telegraph Co.*, 253.

Where there are exceptions to a charge of the trial judge, the case on appeal must state that the instructions excepted to were given. *Hart v. Cannon*, 10.

CERTIORARI.

Where the parties fail to agree on a case on appeal, and the appellant fails for two months to send the papers to the trial judge, the delay not being satisfactorily accounted for, a motion for *certiorari* to bring up the case will be denied. *Stroud v. Telegraph Co.*, 253.

CHARACTER (IN EVIDENCE). See "Evidence."

In a prosecution for murder, evidence that the defendant drank liquor is not admissible, as the character of the defendant was not in evidence, he not being a witness and his character not being provable by particular facts or conduct. *State v. Castle*, 769.

CHATTEL MORTGAGES. See "Mortgages."

Where the owner of lumber authorizes a creditor in possession thereof to sell it and pay himself, such transaction constitutes a present sale of the lumber and passes title, freed from the lien of an unregistered mortgage. *McArthur v. Mathis*, 142.

CLAIM AND DELIVERY.

Where goods are shipped to A. Alexander, and there are two persons of that name, it is competent to show by the shipper for whom they were intended. *Newberry v. Railroad*, 45.

Where a complaint in claim and delivery before a justice of the peace alleges the value of the property to be less than fifty dollars, and the answer does not deny the allegation, no proof of the value is necessary. *Pasterfield v. Sawyer*, 42.

In this action of claim and delivery for a deed there is no evidence that the title to land is involved, and the jurisdiction of the justice of the peace is not ousted. *Pasterfield v. Sawyer*, 42.

CLERKS OF COURTS.

The clerk of the superior court has no jurisdiction of an action to sell property for reinvestment, etc., under acts 1903, ch. 99, but when carried to the superior court on appeal it will be retained for a hearing. *Smith v. Gudger*, 627.

A court of equity may allow a guardian credit for money necessarily

CLERKS OF COURTS—*Continued.*

expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk of the court. *Duffy v. Williams*, 195.

COLLATERAL ATTACK.

A charter of a corporation cannot be collaterally attacked as being fraudulent. *Railroad v. Newton*, 132.

COLOR OF TITLE. See "Adverse Possession."

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession is immaterial. *Atwell v. Shook*, 387.

COMMISSIONS. See "Costs"; "Salaries and Fees."

The allowance of commissions and counsel fees to a receiver by the superior court is *prima facie* correct, and the supreme court will alter the same only when they are clearly inadequate or excessive. *Graham v. Carr*, 449.

CONSTITUTIONAL LAW.

An act which provides that where the owner of swamp land, his heirs or assigns, fail to pay all arrearages of taxes levied and assessed thereon, or which ought to have been levied on or before a certain date, and that such land shall be forfeited to and vested in the state, without any judicial proceeding, is unconstitutional. *Parish v. Cedar Co.*, 478.

CONSTITUTION OF NORTH CAROLINA.

Art. 1, secs. 7, 31. Monopoly. *State v. Biggs*, 729.
Art. 1, sec. 17. Due Process of Law. *Parish v. Cedar Co.*, 478.
Art. 1, secs. 13 and 19. Jury. *Smith v. Paul*, 66.
Art. 2, secs. 14, 16 and 23. General Assembly. *Wilson v. Markley*, 616.
Art. 10, sec. 6. Married Women. *Perkins v. Brinkley*, 154.
Art. 7, sec. 9. Taxation. *Harper v. Comrs.*, 106.
Art. 8, sec. 4. Elections. *Wadsworth v. Conrad*, 587.
Art. 4, sec. 1. Specific Performance. *Boles v. Caudle*, 528.

CONSTITUTION OF THE UNITED STATES.

Fourteenth Amendment, sec. 1. Due Process of Law. *Parish v. Cedar Co.*, 478.
Fourteenth Amendment. *State v. Biggs*, 729.

CONTEMPT.

It is necessary in contempt proceedings for the trial judge to find the facts and file the same. *In re Odum*, 250.

The failure to base proceedings as for contempt on affidavit is waived by the contemnor being sworn and making answer to the contempt. *In re Odum*, 250.

CONTINUANCES.

Where by reason of the accumulation of criminal business a special term of the superior court is called, an indictment found at the special term may be tried during that term, and it is not error to refuse to continue the case for that reason. *State v. Register*, 746.

CONTRACTS. See "Agency"; "Corporations"; "Damages"; "Husband and Wife"; "Parol Evidence"; "Restraint of Trade"; "Tender"; "Undue Influence"; "Waiver."

A common carrier cannot, by inserting in a bill of lading "subject to delay," contract against damages caused by its negligence. *Parker v. Railroad*, 335.

Where a testator contracts to devise certain lands to his children, "with limitations," he may attach such limitations as are in his judgment proper. *Price v. Price*, 494.

A contract to devise land in consideration of the settlement of a family controversy relative to certain lands is valid and may be enforced in a court of equity. *Price v. Price*, 494.

In an action for the specific performance of a contract, controverted facts should be submitted to the jury, but the trial judge, on the admitted facts and those found by the jury, should decide whether the plaintiff is entitled to the equitable relief demanded. *Boles v. Caudle*, 628.

In a suit by a devisee for the specific performance of a contract to devise land, evidence as to what land the devisee had in possession, when and where it had been surveyed, and other evidence of like character, is admissible to locate the land received by the said devisee under the will. *Price v. Price*, 494.

In a suit for the specific performance of a contract to devise certain land, the jury having found that the land devised in the will was the same as that contracted to be devised, it became the duty of the court to construe the contract and the will for the purpose of ascertaining whether the will was a substantial execution of the terms of the contract. *Price v. Price*, 494.

The holder of a policy of insurance does not waive the right to sue for the premiums paid on the policy by paying premiums on the

CONTRACTS—*Continued.*

amount to which such policy had been illegally reduced if he objected to the reduction. *Makely v. Legion of Honor*, 367.

A mutual life insurance association cannot by changing its by-laws lessen the value of a policy by reducing the amount of indemnity. *Makely v. Legion of Honor*, 367.

The holder of a policy of insurance which has been illegally reduced by the company is entitled to sue for the premiums paid and the interest thereon. *Makely v. Legion of Honor*, 367.

An option given February 7th, provided no better offer was received that day by mail, to close "by 8 February," includes the latter day. *Blalock v. Clark*, 306.

Where a policy of insurance provides that the company will, upon death of the insured, pay not exceeding $5,000, and it receives premiums on the full amount, the policy is in legal effect for $5,000. *Makely v. Legion of Honor*, 368.

A refusal to deliver an article sold, because the price had gone up, makes it unnecessary to tender the price. *Blalock v. Clark*, 306.

The liability for non-delivery of a telegram in another state under a contract made in this state is determined by the law of the latter state. *Bryan v. Telegraph Co.*, 603.

In an action for the recovery of services rendered a decedent in a special contract, where the answer sets up a different contract and the performance of the same by the decedent, the same cannot be treated as a counter-claim. *Hatcher v. Dabbs*, 239.

CLARK, C. J., and DOUGLAS, J., concurring in result, hold that a municipal board cannot bind the town by a contract as to necessary expenses to be incurred after their term of office shall expire. *Wadsworth v. Concord*, 587.

The Code, sec. 194, subsec. 2, authorizes an action against a foreign corporation by a non-resident plaintiff where the cause of action arises in this state. *Bryan v. Telegraph Co.*, 603.

A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. *Perkins v. Brinkley*, 348.

Where an attorney was employed by the heirs of a decedent under a contract that he should receive a certain portion of any sums which he might recover from the estate of the decedent, he was not entitled to anything when he recovered nothing for the heirs, though he may have been prevented by them from prosecuting their claim, his remedy being by an action for damages. *Johnston v. Cutchin*, 119.

CONTRACTS—*Continued.*

Where in an action on a note executed pursuant to a contract to convey land the jury finds that plaintiff did not contract as alleged by defendant, the refusal to instruct that if plaintiff did not complete his contract with defendant, and defendant demanded a rescission, plaintiff could not recover, is not harmful to defendant. *Joines v. Johnson*, 487.

In a suit against devisees and executors for specific performance of a contract to devise certain land, it is proper to submit to the jury whether testator devised the land as he contracted. *Price v. Price*, 494.

In an action for damages caused by delay in shipment of goods it is immaterial whether the action is brought *in assumpsit*, upon a breach of contract, or in case for the violation of a common-law duty, or on a tort based on a contract. *Parker v. Railroad*, 336.

Whether a delay of a week was unreasonable, claimed to be due to wet weather, after the acceptance of an option to sell cotton, to go for it and tender payment, is a question for the jury. *Blalock v. Clark*, 306.

A contract between two physicians in a town that at a certain time one will locate elsewhere, if "the field is not larger" when the contract is to be executed than when made, is void because too indefinite. *Teague v. Schaub*, 458.

CONTRIBUTORY NEGLIGENCE. See "Negligence"; "Carriers"; "Damages."

A conductor in charge of a freight train in a railroad yard, who, while giving instructions for the movement of his train, steps on a side-track without looking for other trains, is guilty of contributory negligence. *Lassiter v. Railroad*, 244.

It is contributory negligence for an epileptic to walk on a railroad track. *Marks v. Railroad*, 89.

The evidence in this case is not sufficient to be submitted to the jury as to the negligence of the defendant in killing the decedent, and it shows that the decedent was negligent in failing to look and listen before stepping on the track of the defendant. *Pharr v. Railroad*, 610.

CORPORATIONS. See "Stock"; "Foreign Corporations"; "Express Company"; "Receivers."

A charter of a corporation cannot be collaterally attacked as being fraudulent. *Railroad v. Newton*, 132.

The Code, sec. 194, subsec. 2, authorizes an action against a foreign

CORPORATIONS—*Continued.*

corporation by a non-resident plaintiff where the cause of action arises in this state. *Bryan v. Telegraph Co.*, 603.

The facts in this action for slander are not sufficient to justify a recovery as against the defendant corporation. *Hudnell v. Lumber Co.*, 169.

An officer of a foreign corporation, while in the state attending a judicial sale to which his company is a party, is not exempt from service of summons in an action against the corporation. *Greenleaf v. Bank*, 292.

Acts 1885, ch. 265, authorizing a corporation to hold in escrow a new in lieu of a lost certificate of stock, is repealed by acts 1901, ch. 2, sec. 95. *Travers v. Railroad*, 322.

CORPORATION COMMISSION.

An assessment levied by county commissioners for the purpose of local taxation, based upon the valuation of the corporation commission, cannot be sustained. *Commissioners v. Railroad*, 216.

COSTS. See "Salaries and Fees."

The successful party on appeal from the superior court is entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. *Dobson v. Railroad*, 624.

COUNTER-CLAIM.

Where a defendant sets up a counter-claim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a non-suit. *Olmsted v. Smith*, 584.

In an action on a note to recover the possession of mortgaged property the defendant may set up a counter-claim arising from a breach of a contract. *Lumber Co. v. McPherson*, 287.

In an action for the recovery of services rendered a decedent in a special contract, where the answer sets up a different contract and the performance of the same by the decedent, the same cannot be treated as a counter-claim. *Hatcher v. Dabbs*, 239.

In an action to quiet title to land, an injunction having been issued to prevent the defendant from cutting timber, the plaintiff may take a non-suit, although the defendant claimed damages by reason of the injunction. *Olmsted v. Smith*, 584.

COUNTS. See "Indictments."

COVENANTS. See "Warranty."

CRIMINAL LAW. See "Accessory"; "Accomplices"; "Affray"; "Arguments of Counsel"; "Arrest of Judgment"; "Arson"; "Assault"; "Burden of Proof"; "Burglary"; "Case on Appeal"; "Character (In Evidence)"; "Declarations"; "Druggists"; "Dueling"; "Dying Declarations"; "Embezzlement"; "Exceptions and Objections"; "Findings of Court"; "Former Conviction"; "Former Jeopardy"; "Fornication and Adultery"; "Gaming"; "Grand Jury"; "Homicide"; "Impeachment of Witnesses"; "Intent"; "Intoxicating Liquors"; "Larceny"; "Licenses"; "New Trial"; "Punishment"; "Reasonable Doubt"; "Receiving Stolen Goods"; *"Res Gestæ"*; "Robbery"; "Self-defense"; "Warrant"; "Witnesses."

D

DAMAGES. See "Contributory Negligence"; "Negligence"; "Carriers."

The issue, "What damages, if any, plaintiff is entitled to recover," in an action for the recovery for services rendered a decedent under a special contract, does not present to the jury all the matters in controversy. *Hatcher v. Dabbs*, 239.

In an action against a telegraph company for the erection of poles on the land of plaintiff, it is error to instruct that in addition to permanent damages the land owner was entitled to recover for damages to crops. *Hodges v. Telegraph Co.*, 225.

To aid the jury in arriving at the present value of the earning capacity of a person killed, the trial judge should give a mathematical rule for computing the same. *Watson v. Railroad*, 188.

On the question of damages for personal injuries it is not error for the trial court to refuse to charge that they should deduct from the earning capacity losses from sickness, railroad accidents and time not employed. *Watson v. Railroad*, 188.

A summons served on a telegraph company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time. *Bryan v. Telegraph Co.*, 603.

In the assessment of land taken for railroad purposes special benefits to the land and not benefits received in common with other property should be considered in reduction of the award for damages. *Railroad v. Platt Land*, 266.

The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. *Railroad v. Platt Land*, 266.

A telegraph line along a railroad and on the right of way thereof is

DAMAGES—*Continued.*

an additional burden upon the land, for which the land owner is entitled to just compensation. *Hodges v. Railroad*, 225.

In this action against a telegraph company for damages for delay in the delivery of a message, the facts render the company liable only for nominal damages. *Salmons v. Telegraph Co.*, 541.

There is in this action for damages for refusal to allow a person to board a train sufficient evidence of insult or other aggravating circumstances to be submitted to the jury on the question of punitive damages. *Story v. Railroad*, 59.

In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. *Story v. Railroad*, 59.

In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, evidence that he was on the train intoxicated at another time is not competent. *Story v. Railroad*, 59.

Mental anguish, though unattended with physical injury, is an element of damage in actions against telegraph companies for the non-delivery of messages. *Bryan v. Telegraph Co.*, 604.

The liability for non-delivery of a telegram in another state under a contract made in this state is determined by the law of the latter state. *Bryan v. Telegraph Co.*, 603.

In an action to recover damages for personal injuries, it is error to instruct that if the machinery was out of order, as contended by the plaintiff, and the defect was known by the defendant, the defect constituted a continuing negligence on the part of the defendant, and it was not contributory negligence on the part of intestate of plaintiff to do what he did, without adding "if the negligence of the defendant was the proximate cause of the injury." *Marcus v. Loane*, 54.

Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. *Sossamon v. Cruse*, 470.

In an action for damages for the temporary obstruction of a waterway, the measure thereof is the loss of crops occasioned thereby up to the time of the bringing of the suit. *Jones v. Kramer*, 446.

A judgment by default and inquiry merely admits a cause of action, and carries only nominal damages and costs; the burden of

DAMAGES—*Continued.*

proving any damages beyond a penny being still upon plaintiff. *Osborn v. Leach*, 427.

Where an action is for malicious prosecution and illegal arrest, and an issue is submitted as to each, two issues should be submitted as to damages. *Kelly v. Traction Co.*, 418.

In an action by a tenant against his landlord and another tenant for damages caused by water leaking from a pipe it was error to submit the issue as to whether the plaintiff was injured by the defendants, or either of them, as an affirmative answer thereto would be indefinite. *Pearce v. Fisher*, 333.

Where the damage caused by an excavation might have been reasonably anticipated, the owner of land upon which the excavation is made is liable therefor, though the negligence was that of an independent contractor. *Davis v. Summerfield*, 325.

The grantee of land cannot maintain an action for damages for a trespass committed before he became the owner thereof. *Drake v. Howell*, 163.

An action for trespass for cutting and removing timber from land cannot be maintained by one not in actual or constructive possession thereof. *Drake v. Howell*, 162.

The question of the measure of damages does not arise on appeal from the sustaining of a demurrer to the evidence for failure to show a cause of action. *Blalock v. Clark*, 306.

DEATH BY WRONGFUL ACT. See "Negligence."

Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile. *Hartness v. Pharr*, 566.

DECLARATIONS. See "Evidence."

Conversations with the grantor in a trust deed, without evidence that they were had with or were known to the trustee or *cestui que trust*, or that the deed was made with reference thereto, are inadmissible in a suit involving the construction of the deed. *Perkins v. Brinkley*, 348.

Where a husband is in possession of land as agent of his wife, his declarations to strangers in regard to the boundaries of her land are not admissible against her. *Perkins v. Brinkley*, 348.

Where one person claims goods by purchase of another, the declarations of the seller as to ownership of the same, he having never

DECLARATIONS—*Continued.*

been in possession thereof, are not competent. *Newberry v. Railroad*, 45.

Where a prosecuting witness is asked as to a conversation and denies it, the answer to which would be calculated to show the temper and disposition of the witness, the defendant is entitled to show that the declaration was made, though the time was not the same as that stated to the witness. *State v. Crook*, 672.

Where a person indicted for murder procured a witness to aid in the commission of the homicide, statements made by him to the witness at the time are competent as a part of the *res gestæ*. *State v. Register*, 747.

DEEDS. See "Boundaries"; "Acknowledgments."

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession is immaterial. *Atwell v. Shook*, 387.

Where a survey of land is made in contemplation of a division by deed, the line marked on the survey does not control the calls in deeds subsequently made, in case of a variance, in the absence of fraud or mistake. *Elliott v. Jefferson*, 207.

A purchaser claiming land under a sale for internal revenue taxes against the owner cannot sustain his title under the deed of the collector if he fails to show independently of the mere recitals in the record or in his deed that a return was made by the person liable to be assessed, or that the commissioner of internal revenue had made the assessment, or that a warrant of distraint had been issued, or that a certificate of purchase had been given to the purchaser at the sale. *Stewart v. Pergusson*, 276.

Where a deed calls for a swamp and thence with the run of said swamp, the first call must go to the *run* of the swamp and not terminate at the edge of the same. *Rowe v. Lumber Co.*, 433.

Where plaintiff executed a deed to a third person and accepted a mortgage from defendant to secure the purchase money, the plaintiff, acting as a justice of the peace, was not incompetent to acknowledge a transfer by such third person of his deed to defendant. *Joines v. Johnson*, 487.

Where the calls in a deed are ambiguous or uncertain, it is a question for the jury to decide what was meant. *Rowe v. Lumber Co.*, 433.

Where a call in a deed terminates at a swamp, the question whether

DEEDS—*Continued.*

the edge or run of the swamp is meant is for the jury. *Rowe v. Lumber Co.*, 433.

Where no evidence is offered as to when a map found among the grantor's books was made, or that it was in existence and referred to by the parties at the execution of the deed, it is inadmissible to show the land included in the deed. *Perkins v. Brinkley*, 348.

Where a deed calls for the mouth of a stream emptying into a swamp, the location thereof should be left to the jury. *Rowe v. Lumber Co.*, 433.

Where a deed is recorded in the county where the land is situated, and the county is afterwards divided, it is not necessary to register the deed in the new county, though the land lies therein. *Bivings v. Gosnell*, 574.

Where, in an action for trespass in cutting timber, plaintiff failed to prove that he was in actual possession or that he had legal title to the trees, defendants were not estopped from denying plaintiff's title by two deeds by plaintiff and another, conveying the right to cut the timber to defendants, under one of which defendants' rights had expired by limitation before any attempt had been made to cut the timber, and the other never having been delivered. *Drake v. Howell*, 163.

An endorsement on the back of a deed, properly acknowledged, that for value received the grantee in the deed conveys to A all the right and title vested in him by virtue of the said deed, conveys no title. *Joines v. Johnson*, 487.

It is sufficient to charge, as to undue influence or fraud, that the law scrutinizes transactions between guardian and ward, and that the burden is on the guardian to show that all his transactions with his ward are fair. *Hart v. Cannon*, 10.

The bare fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in the deed. *Hart v. Cannon.* 10.

In this action for claim and delivery for a deed there is no evidence that the title to land is involved, and the jurisdiction of the justice of the peace is not ousted. *Pasterfield v. Sawyer*, 42.

Under the provisions of the deed as set out in this case, two of the grantees, after the death of the other grantee, without issue, and the death of the grantor, can make a fee-simple title to the land in controversy. *Gray v. Hawkins*, 1.

DEMURRER. See "Pleadings."

A reference should not be ordered, after overruling a demurrer,

DEMURRER—*Continued.*

until the pleadings are in and the parties are at issue. *Lumber Co. v. McPherson*, 287.

Where the court sustains a plea of former conviction after the jury has returned a verdict of guilty, the proper practice is to strike out the verdict and sustain the plea as upon a demurrer by the state; and to enter a judgment of not guilty on the verdict as rendered is improper. *State v. Taylor*, 755.

DESCENT AND DISTRIBUTION. See "Executors and Administrators."

A will expressly excluding the children of the testator born after the execution thereof makes a provision for them under The Code, sec. 2145, and such children do not share in the estate as though the testator had died intestate. *Thomason v. Julian*, 309.

Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile. *Hartness v. Pharr*, 566.

DISMISSAL. See "Non-suit."

A motion to dismiss an action for trespass for failure to make an administrator a party thereto cannot be made in the supreme court. *Rowe v. Lumber Co.*, 433.

It is too late after verdict upon an issue or issues of fact for a plaintiff to take a nonsuit; and where the jury, after rendering a verdict, had returned to the jury room to correct a mere formal defect in the verdict, and as they retired the counsel for plaintiff informed the trial judge that the plaintiff would take a nonsuit, there was no error in refusing it. *Strause v. Sawyer*, 64.

DIVORCE.

In an action for divorce from bed and board, the affidavit required by section 1287 of The Code must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts therein stated. *Clark v. Clark*, 28.

In an application for alimony *pendente lite* the affidavit and petition must be verified as required by section 1287 of The Code. *Clark v. Clark*, 28.

DOMICILE.

Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds

DOMICILE—*Continued.*

recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile. *Hartness v. Pharr*, 566.

DUE PROCESS OF LAW.

An act which provides that where the owner of swamp land, his heirs or assigns, fail to pay all arrearages of taxes levied and assessed thereon, or which ought to have been levied on or before a certain date, and that such land shall be forfeited to and vested in the state, without any judicial proceeding, is unconstitutional. *Parish v. Cedar Co.*, 478.

DRUGGISTS.

Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. *State v. Neal*, 689.

DYING DECLARATIONS. See "Evidence"; "Declarations."

The facts of this case make the dying declarations of the deceased competent. *State v. Boggan*, 761.

DUELING.

A person indicted for dueling may be convicted of an assault. *State v. Fritz*, 725.

The challenge to fight a fair fight with fists and hands and not to use any deadly weapon is not dueling. *State v. Fritz*, 725.

Where there is an indictment in the superior court for an offense of which it has original jurisdiction, and a lesser offense is proved, it will retain jurisdiction, although it does not have original jurisdiction of the lesser offense. *State v. Fritz*, 725.

E

EASEMENTS. See "Eminent Domain"; "Railroads."

A telegraph line along a railroad and on the right of way thereof is an additional burden upon the land, for which the land owner is entitled to just compensation. *Hodges v. Telegraph Co.*, 225.

EJECTMENT.

The evidence in this case to recover land is sufficient to warrant the denial of a motion to dismiss. *Bivings v. Gosnell*, 574.

A defendant is an action for the recovery of real property cannot show that a deed in the chain of his adversary's title, absolute

EJECTMENT—*Continued.*

in form, was a mere mortgage, unless he expressly pleads it. *Locklear v. Bullard,* 260.

An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the co-tenant then out of possession. *Locklear v. Bullard,* 260.

ELECTIONS.

Where a statute provides that an election shall be held to pass upon the question whether a town shall incur the expense of an electric light system, the board of aldermen cannot contract for the establishment of such electric light system without first submitting the question to a vote of the people of the town. *Wadsworth v. Concord,* 587.

ELECTION OF REMEDIES.

A devisee, seeking specific performance of a contract to devise lands, cannot be required to elect whether he will take under the will or under the contract. *Price v. Price,* 495.

EMBEZZLEMENT.

In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the state to show beyond a reasonable doubt the intent to defraud. *State v. McDonald,* 680.

EMINENT DOMAIN. See "Railroads"; "Telegraphs."

In the assessment of land taken for railroad purposes special benefits to the land and not benefits received in common with other property should be considered in reduction of the award for damages. *Railroad v. Platt Land,* 266.

The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. *Railroad v. Platt Land,* 266.

An injunction will not lie to restrain a railroad company from entering upon land before the appraisement of damages and the payment thereof. *Railroad v. Newton,* 132.

A charter of a corporation cannot be collaterally attacked as being fraudulent. *Railroad v. Newton,* 132.

In condemnation proceedings a land owner is not entitled at the hearing before the clerk to have issues tried by a jury. *Railroad v. Newton,* 132.

An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is inter-

EMINENT DOMAIN—*Continued.*

locutory, and no appeal lies therefrom, though a plea in bar was filed by the defendant. *Railroad v. Newton,* 132.

In an action to condemn land for railroad purposes the court may allow an amendment to the complaint of a better profile. *Railroad v. Newton,* 132.

In an action by a land owner against a telegraph company for damages because of the erection of poles on the right of way granted to the railroad, evidence that the telegraph line was necessary to the operation of the road is immaterial. *Hodges v. Telegraph Co.,* 225.

In an action against a telegraph company for the erection of poles on the land of plaintiff, it is error to instruct that in addition to permanent damages the land owner was entitled to recover for damages to crops. *Hodges v. Telegraph Co.,* 225.

A writ of prohibition is not a writ of right, but its issuance is a matter of discretion, and will not be granted to prevent the clerk of the superior court from hearing an application for the condemnation of a right of way for a railroad. *Railroad v. Newton,* 136.

EQUITY. See "Election of Remedies"; "Fraud"; "Mistake"; "Specific Performance."

A contract to devise land in consideration of the settlement of a family controversy relative to certain lands is valid and may be enforced in a court of equity. *Price v. Price,* 494.

ESCAPE. See "Accomplices"; "Arrest"; "Warrants."

Were a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. *Sossamon v. Cruse,* 470.

ESTATES. See "Deeds"; "Remainders"; "Warranty"; "Wills."

Persons not in being who may have an interest in property invested, in an action for the sale thereof and reinvestment are not necessary parties. *Smith v. Gudger,* 627.

In an action for the sale of land for re-investment, in which there are contingent interests, it is sufficient to make parties those who would, by the happening of the contingency, have an estate therein at the time of the commencing of the action; and where the remainder may go to minors or persons not *in esse* or unknown, the court may appoint a guardian *ad litem* to represent such parties. *Hodges v. Lipscomb,* 199.

ESTATES—*Continued.*

Where realty is devised to a person and her children during their lifetime and then to go to her grandchildren, on default of grandchildren *in esse* at the death of testator the fee vests in the heirs at law of the testator to the use of any grandchildren who might thereafter be born. *Holton v. Jones*, 399.

ESTOPPEL. See "Agency"; "Easements"; "Warranty."

In a special proceeding to determine boundary, where the defendant raises no issue of title and takes no appeal, the judgment of the clerk determining the boundary is *res judicata* in a subsequent action between the parties for cutting timber beyond the boundary so established. *Parker v. Taylor*, 103.

Where an insurance company, by inadvertence, sends notice to a policy-holder for a less premium than that due, it is not estoppel, upon discovery of the error, from collecting the proper amount. *Smallwood v. Ins. Co.*, 15.

Where, in an action for trespass in cutting timber, plaintiff failed to prove that he was in actual possession or that he had legal title to the trees, defendants were not estopped from denying plaintiff's title by two deeds by plaintiff and another, conveying the right to cut the timber to defendants, under one of which defendants' rights had expired by limitation before any attempt had been made to cut the timber, and the other never having been delivered. *Drake v. Howell*, 163.

EVIDENCE. See "Admissions"; "Character (in Evidence)"; "Declarations"; "Dying Declarations"; "Experts"; "Parol Evidence"; "*Res Gestae.*"

The evidence in this case to recover land is sufficient to warrant the denial of a motion to dismiss. *Bivings v. Gosnell*, 574.

An instruction containing a statement of a fact upon which the evidence is conflicting should not be given. *Davis v. Summerfield*, 325.

In an action for damages for refusal to allow a person with a ticket to board a train, the trial court properly refused to instruct that the conductor, in refusing, might consider that the same person had given him trouble at other times. *Story v. Railroad*, 59.

Where one person claims goods by purchase of another, the declarations of the seller as to ownership of the same, he having never been in possession thereof, are not competent. *Newberry v. Railroad*, 45.

In this action against a railroad company to recover for personal

EVIDENCE—*Continued.*

injuries, the answer introduced as evidence does not admit that the decedent could not see the approaching train and was unaware of its approach. *Pharr v. Railroad Co.*, 610.

It is not error to refuse to charge that the presumption of law that notes were the property of the payee could not be rebutted by the unsupported evidence of the payee that they were executed to him by mistake. *Sallinger v. Perry*, 35.

The exception that there is no evidence on an issue must be taken before verdict. *Hart v. Cannon*, 10.

In an indictment for larceny of goods from a dwelling in the daytime, recent possession by the defendant of the stolen goods is a circumstance tending to prove that the defendant entered the dwelling from which the goods were stolen. *State v. Hullen*, 656.

In an indictment for larceny, evidence that the defendant had in his possession goods stolen at the same time at which those were stolen for which he was indicted is competent. *State v. Hullen*, 656.

On a trial for stealing money from prosecutor while drunk, the state having, as a basis for the argument that defendant was preparing to take it, shown that after taking it from prosecutor's pocket, at his request, to pay for the liquor, he, in putting it back, called the attention of the clerk to the fact, he, to explain this conduct, may show that prosecutor was in the habit of losing money while drunk and wrongfully accusing people of stealing it, and that he knew of this habit. *State v. Lewis*, 653.

It is error to instruct the jury that because of interest they should carefully scrutinize the evidence of defendants, *without adding* that if the jury believe the evidence it should have the same weight as if the witness was not interested. *State v. Graham*, 645.

In a prosecution for highway robbery, it is error in the trial judge to ask in his instructions: "Were the defendants concealed in the bushes near the public highway?" etc., there being no evidence of such facts. *State v. Graham*, 645.

The objection that there is not sufficient evidence of the intent with which the defendant entered a dwelling must be taken before verdict. *State v. Staton*, 643.

Where a prosecuting witness is asked as to a conversation and denies it, the answer to which would be calculated to show the temper and disposition of the witness, the defendant is

EVIDENCE—*Continued.*

entitled to show that the declaration was made, though the the time was not the same as that stated to the witness. *State v. Crook*, 672.

In a suit by a *cestui que trust* for rents due from the trustee, testimony as to a settlement of the boundaries between plaintiff and grantor's children is inadmissible where defendant had taken possession of and rented the land. *Perkins v. Brinkley*, 348.

Conversations with the grantor in a trust deed, without evidence that they were had with or were known to the trustee or *cestui que trust*, or that the deed was made with reference thereto, are inadmissible in a suit involving the construction of the deed. *Perkins v. Brinkley*, 348.

Where a husband is in possession of land as agent of his wife, his declarations to strangers in regard to the boundaries of her land are not admissible against her. *Perkins v. Brinkley*, 348.

In an indictment for pulling down and removing a fence surrounding a cultivated field, it is not competent for the defendant to show that he did the act as the agent of another person. *State v. Campbell*, 640.

Where no evidence is offered as to when a map found among the grantor's books was made, or that it was in existence and referred to by the parties at the execution of the deed, it is inadmissible to show the land included in the deed. *Perkins v. Brinkley*, 348.

In an action for damages for delay in shipment of perishable fruit, a newspaper published at the destination is admissible as proving negligence of the carrier, under an agreement permitting the use of copies of the paper on the question of the condition of the market and market value. *Parker v. Railroad*, 336.

In an action by a land owner against a telegraph company for damages because of the erection of poles on the right of way granted to the railroad, evidence that the telegraph line was necessary to the operation of the road is immaterial. *Hodges v. Telegraph Co.*, 225.

A promissory note, though not stamped with a revenue stamp as required by a federal statute, may be used in evidence. *Davis v. Evans*, 320.

Were the trial judge allows a party to introduce in evidence certain parts of the pleadings of the opposite party, the latter may himself introduce so much of his own pleadings as may be necessary to explain any admission in the part offered by the other party, and the amount allowable is discretionary

EVIDENCE—*Continued.*

with the judge, except in case of palpable abuse. *Manufacturing Co. v. Steinmetz*, 192.

The journals of the general assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. *Wilson v. Markley*, 616.

In an action for removing a fence from a cultivated field, the defendant cannot, as a defense, show title in himself, the prosecutor being in actual quiet possession. *State v. Campbell*, 640.

The journal of the legislature is competent evidence only for the purpose of ascertaining whether a law had been passed in accordance with the constitution, article 2, section 14, requiring it to be read three times on three different days in each house and the yeas and nays to be entered on the second and third reading. *Wilson v. Markley*, 616.

A copy of the journal of the legislature deposited with the secretary of state is not evidence for any purpose, and a misnomer of a town in a private act therein does not affect the validity of the act. *Wilson v. Markley*, 616.

The facts of this case make the dying declarations of the deceased competent. *State v. Boggan*, 761.

A defendant in an action for the recovery of real property cannot show that a deed in the chain of his adversary's title, absolute in form, was a mere mortgage, unless he expressly pleads it. *Locklear v. Bullard*, 250.

The evidence in this case is sufficient to justify the refusal of the trial judge to instruct the jury that there was no evidence of murder in the first degree, or second degree, or manslaughter. *State v. Boggan*, 761.

A person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious in so doing. *State v. Register*, 747.

A general objection to evidence will not be entertained if such evidence consists of several distinct parts, some of which are competent and some not competent. *State v. Ledford*, 714.

In an action for malicious prosecution a statement of the defendant that he would spend one thousand dollars to have his revenge is some evidence of malice. *Coble v. Huffines*, 422.

The trial judge should not give an instruction not supported by the evidence. *Joines v. Johnson*, 487.

In an action for malicious prosecution it is not necessary to show that the defendant company swore out the warrant, it being

EVIDENCE—*Continued.*

sufficient if it directly or indirectly procured it to be issued. *Kelly v. Traction Co.*, 418.

In an action for malicious prosecution, an order in the criminal prosecution designating defendant as the prosecutor, and taxing him with the costs, is not admissible against him either to show malice or the want of probable cause. *Coble v. Huffines*, 422.

The evidence in this case is not sufficient to be submitted to the jury as to the negligence of the defendant in killing the decedent, and it shows that the decedent was negligent in failing to look and listen before stepping on the track of the defendant. *Bryan v. Railroad Co.*, 610.

In a prosecution for murder, evidence that the defendant drank liquor is not admissible, as the character of the defendant was not in evidence, he not being a witness and his character not being provable by particular facts or conduct. *State v. Castle*, 769.

In this action for personal injuries the evidence is sufficient to sustain a finding that the engineer, by the exercise of due care and prudence, could have prevented the injury, notwithstanding the negligence of the plaintiff. *Marks v. Railroad*, 89.

It is not error to refuse to charge that where it is sought to show by parol evidence that notes were executed to the payee by mistake, that the evidence should be received with great caution and the jury should look anxiously for some corroboratory facts and circumstances in support of it, and that the claimant of the note should not delay in the ascertainment of his rights, as a stale claim would merit but little attention. *Sallinger v. Perry*, 35.

Where goods are shipped to A. Alexander, and there are two persons of that name, it is competent to show by the shipper for whom they were intended. *Newberry v. Railroad*, 45.

Standing trees are a part of the realty and are not the subject of parol conveyance, and any evidence thereof is not competent. *Drake v. Howell*, 162.

There is in this action for damages for refusal to allow a person to board a train sufficient evidence of insult or other aggravating circumstances to be submitted to the jury on the question of punitive damages. *Story v. Railroad*, 59.

Where there is no evidence of the loss of a note, or that an alleged assignment thereof was in the handwriting of the payee, parol

EVIDENCE—*Continued.*

evidence is incompetent to show the assignment. ***Stancill v. Spain,*** 76.

That a person listening at a crossing fails to hear the ringing of the train bell or the sounding of the whistle is some evidence that neither was done. ***Butts v. Railroad,*** 82.

Where the description of land in a mortgage is ambiguous, admissions by the deceased mortgagee are competent to show that certain land was not intended to be included in the mortgage. ***Stancill v. Spain,*** 76.

The failure of an engineer to ring the bell or sound the whistle on approaching a crossing is some *evidence* of negligence. ***Butts v. Railroad,*** 82.

In an action for damages by fire, evidence that combustible matter was allowed to remain on the right of way of a private railroad, and that a fire was burning on the right of way soon after a train had passed, is sufficient to submit to the jury on the question of the negligence of the defendant. ***Simpson v. Lumber Co.,*** 95.

Where a devisee seeks the specific performance of a contract to devise certain land, executed on the compromise of a certain suit, the record in such suit is not admissible in evidence. ***Price v. Price,*** 494.

In a suit by a devisee for the specific performance of a contract to devise land, evidence as to what land the devisee had in possession, when and where it had been surveyed, and other evidence of like character, is admissible to locate the land received by the said devisee under the will. ***Price v. Price,*** 494.

In an action against a carrier for failure to protect a passenger against an assault at a station, the evidence by a witness that he told the person assaulted immediately after the assault that an employee of the carrier took part in the assault is competent as part of the *res gestae.* ***Seawell v. Railroad,*** 515.

The admissions of a prosecuting witness are admissible against him on another trial for the same or any other offense. ***State v. Simpson,*** 676.

Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. ***State v. Simpson,*** 676.

Where there is no exception to the sufficiency of the evidence and the evidence is not set out in the record, the sufficiency thereof will not be considered on appeal. ***State v. Tyson,*** 692.

EVIDENCE—*Continued.*

Evidence that the accused sold three pints of liquor does not sustain the charge of a sale by a measure less than a quart. *State v. Holder*, 710.

An expert must base his opinion upon facts within his own knowledge or upon the hypothesis of the finding by the jury of certain facts recited in the question. *Summerlin v. Railroad*, 550.

Where an objection to evidence is improperly sustained, but the same evidence is subsequently admitted, it is harmless error. *Summerlin v. Railroad*, 550.

An indictment against a witness who had turned State's evidence is not admissible to impeach him. *State v. Register*, 747.

A letter written by an accused tending to show an attempt to manufacture or suggest statements that a witness should testify to in his interest is competent against the accused. *State v. Register*, 747.

Where a person indicted for murder procured a witness to aid in the commission of the homicide, statements made by him to the witness at the time are competent as a part of the *res gestae*. *State v. Register*, 747.

In a prosecution for murder, evidence that the accused, who was a foreman of a lumber camp, had not sent the deceased sufficient dinner on the day of the killing, is irrelevant. *State v. Castle*, 769.

The facts in this case are not sufficient to justify the setting aside of a judgment by default and inquiry. *Osborn v. Leach*, 427.

On a prosecution for arson a witness testified that the evening before the night of the burning the children of defendant came to her house and borrowed matches, and that the morning after the fire she stated to defendant that she thought she furnished the matches which burned the barn, whereupon he said that if she thought so not to say anything about it; that witness and the owner of the barn were not friendly; and that about a week before the burning defendant came to witness' house to get some tobacco, and witness said she had none, and he asked her why she did not get some from the owner of the barn and never pay for it, and stated that the owner was getting rich too fast, and that he had a fine barn, but that it would not stand two years, such evidence was competent. *State v. Ledford*, 715.

EXCEPTIONS AND OBJECTIONS. See "Appeal."

The objection that there is not sufficient evidence of the intent

EXCEPTIONS AND OBJECTIONS—*Continued.*

with which the defendant entered a dwelling must be taken before verdict. *State v. Staton*, 642.

Where the record does not show what part of a paragraph of the pleadings was offered in evidence, an exception thereto is too indefinite and will not be considered on appeal. *Clegg v. Railway Co.*, 303.

An appeal from a judgment on the report of a referee overruling exceptions thereto will be treated as an exception to the judgment based upon the conclusion of fact by the referee. *Miller v. Coxe*, 578.

The exception that there is no evidence on an issue must be taken before verdict. *Hart v. Cannon*, 10.

An exception to a charge which does not specify the ground of objection is too general to be considered. *Joines v. Johnson*, 487.

An exception that "the court erred in rendering said judgment" is too general to be considered on appeal. *Wilmington v. McDonald*, 548.

A general objection to evidence will not be entertained if such evidence consists of several distinct parts, some of which are competent and some not competent. *State v. Ledford*, 714.

A "broadside" exception to a charge will not be considered on appeal. *State v. Register*, 747.

Where on appeal an exception is not referred to in the brief of appellant, it will be taken as abandoned. *State v. Register*, 747.

The statute of limitations, if relied on by the accused, should be specifically brought to the attention of the trial judge by a plea or a request to instruct. *State v. Holder*, 709.

An objection to venue is waived unless taken in apt time by a plea in abatement. *State v. Holder*, 709.

An exception to the remarks of counsel made during the argument must be taken before verdict. *State v. Tyson*, 692.

Where there is no exception to the sufficiency of the evidence and the evidence is not set out in the record, the sufficiency thereof will not be considered on appeal. *State v. Tyson*, 692.

Where a witness has testified as an expert to several material matters, a general objection to a particular question thereafter is insufficient to raise the question of his competency as an expert. *Summerlin v. Railroad*, 551.

An objection to the venue in that a case had been improperly removed from one county to another must be taken by a plea

EXCEPTIONS AND OBJECTIONS—*Continued.*

in abatement, not by a motion in arrest of judgment. *State v. Ledford*, 714.

Where the plaintiff excepts to a compulsory reference, an objection taken for the first time on appeal to the technical form of asking submission of issues arising "on the report" instead of "on the pleadings" will not be considered. *Kerr v. Hicks*, 175.

Where there are exceptions to a charge of the trial judge, the case on appeal must state that the instructions excepted to were given. *Hart v. Cannon*, 10.

An objection to a certain instruction on the ground that there was no evidence to support it cannot be reviewed, unless all of the evidence is contained in the record. *Atwell v. Shook*, 387.

EXCUSABLE NEGLECT. See "Judgments."

On a motion to set aside a judgment, if the court finds the movant guilty of inexcusable neglect, it need not find whether the defendant had a meritorious defense. *Turner v. Machine Co.*, 381.

The facts in this case are not sufficient to justify the setting aside of a judgment by default and inquiry. *Osborn v. Leach*, 427.

On appeal from a refusal to set aside a judgment by default and inquiry on the ground of excusable neglect, affidavits will not be considered; the findings of fact by the judge being conclusive. *Osborn v. Leach*, 427.

A defendant against whom a default judgment has been taken is not entitled to have the default opened and judgment set aside merely because he has a meritorious defense, if his failure to assert it was not due to excusable neglect. *Osborn v. Leach*, 427.

EXECUTIONS. See "Attachment"; "Judgments."

A levy on land located in another county than that in which the judgment was obtained may be made without docketing a transcript of the judgment in the county where the land lies. *Evans v. Alridge*, 378.

In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. *Harvey v. Johnson*, 352.

EXECUTORS AND ADMINISTRATORS. See "Legacies and Devises."

Where a widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance, such action is not maintainable. *Perkins v. Brinkley*, 86.

EXECUTORS AND ADMINISTRATORS—*Continued.*

A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. *Perkins v. Brinkley*, 86.

Where the beneficiaries of a life policy allowed the proceeds thereof to be applied to the payment of a mortgage on decedent's realty, as directed by decedent's will, they were entitled to the funds in the hands of the executor of decedent as creditors by reason of the payment of their insurance money on the mortgage debt. *Johnston v. Cutchin*, 119.

In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined. *Rowe v. Lumber Co.*, 433.

The beneficiary of a life policy, who was indebted to the estate of decedent in a greater amount than his share of the insurance money which he and the other beneficiaries allowed to be applied to the payment of a mortgage on decedent's realty, could not claim any part of the funds in the hands of the executor of decedent as creditor by reason of such payment. *Johnston v. Cutchin*, 119.

A motion to dismiss an action for trespass for failure to make an administrator a party thereto cannot be made in the supreme court. *Rowe v. Lumber Co.*, 433.

A personal representative cannot sell land to pay debts barred by limitation. *Robinson v. McDowell*, 182.

Where the trustee in an assignment for the benefit of creditors and the administrator of the grantor, having joined in a proceeding to sell land, allege that the grantor died seized of the land in fee, the title of the purchaser is not affected thereby. *Robinson v. McDowell*, 182.

Where the grantor, after making an assignment for the benefit of creditors, dies, his personal representative and the trustee may join in a special proceeding before the clerk to sell the real estate to pay debts. *Robinson v. McDowell*, 182.

Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile. *Hartness v. Pharr*, 566.

EXEMPTIONS. See "Homestead."

In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions

EXEMPTIONS—*Continued.*

against the action, but may claim the same upon issuance of execution. *Harvey v. Johnson*, 352.

EXPRESS COMPANY. See "Corporations."

A person employed by a railroad company to load express hauled by the railroad company for the express company is not a fellow-servant of an employee of the express company. *Hopper v. Express Co.*, 375.

EXPERTS. See "Evidence."

Where a witness has testified as an expert to several material matters, a general objection to a particular question thereafter is insufficient to raise the question of his competency as an expert. *Summerlin v. Railroad*, 551.

An expert must base his opinion upon facts within his own knowledge or upon the hypothesis of the finding by the jury of certain facts recited in the question. *Summerlin v. Railroad*, 550.

F.

FEES. See "Attorney and Client"; "Commissions"; "Salaries and Fees."

FELLOW-SERVANT. See "Master and Servant."

A person employed by a railroad company to load express hauled by the railroad company for the express company is not a fellow-servant of an employee of the express company. *Hopper v. Express Co.*, 375.

FENCES. See "Stock Law."

In an action for removing a fence from a cultivated field, the defendant cannot, as a defense, show title in himself, the prosecutor being in actual quiet possession. *State v. Campbell*, 640.

Under The Code, a cultivated field is one kept and used for cultivation according to the ordinary course of husbandry, and the smallness of the tract makes no difference. *State v. Campbell*, 640.

In an indictment for pulling down and removing a fence surrounding a cultivated field, it is not competent for the defendant to show that he did the act as the agent of another person. *State v. Campbell*, 640.

FINDINGS OF COURT. See "Superior Court."

The finding of the trial judge that jurors were indifferent is not reviewable on appeal. *State v. Register*, 747.

FINDINGS OF COURT—*Continued.*

On appeal to the superior court from an order of a justice denying a motion to open a default judgment, the court may disregard the justice's finding of fact and hear the matter anew. *Turner v. Machine Co.*, 381.

On a motion to set aside a judgment, if the court finds the movant guilty of inexcusable neglect, it need not find whether the defendant had a meritorious defense. *Turner v. Machine Co.*, 381.

It is necessary in contempt proceedings for the trial judge to find the facts and file the same. *In re Odum*, 250.

On appeal from a refusal to set aside a judgment by default and inquiry on the ground of excusable neglect, affidavits will not be considered; the findings of facts by the judge being conclusive. *Osborn v. Leach*, 427.

A finding by the trial judge that persons drawn on a special venire were not freeholders is conclusive on appeal. *State v. Register*, 764.

A finding by the trial judge that the time for filing an answer has expired is conclusive, and any extension of the time is within the discretion of the court. *Wilmington v. McDonald*, 548.

FORECLOSURE OF MORTGAGES. See "Mortgages."

FOREIGN CORPORATIONS. See "Corporations."

The Code, sec. 194, subsec. 2, authorizes an action against a foreign corporation by a non-resident plaintiff where the cause of action arises in this state. *Bryan v. Telegraph Co.*, 603.

A non-resident corporation, against which a default judgment was obtained after service by publication, is not entitled to have the default judgment opened on the ground that it had no notice of the pendency of the suit unless it shows that it exercised due diligence. *Turner v. Machine Co.*, 381.

FORFEITURES.

An act which provides that where the owner of swamp land, his heirs or assigns, fail to pay all arrearages of taxes levied and assessed thereon, or which ought to have been levied on or before a certain date, and that such land shall be forfeited to and vested in the state, without any judicial proceedings, is unconstitutional. *Parish v. Cedar Co.*, 478.

FORMER ADJUDICATION.

Where an action is brought to restrain a sale under a mortgage on account of alleged usury, and it is removed to the federal

FORMER ADJUDICATION—*Continued.*

court and the amount in controversy is adjudicated, the judgment therein is a bar to a subsequent action by the mortgagor for alleged usury in the mortgage. *Best v. Mortgage Co.*, 20.

In a special proceeding to determine boundary, where the defendant raises no issue of title and takes no appeal, the judgment of the clerk determining the boundary is *res judicata* in a subsequent action between the parties for cutting timber beyond the boundary so established. *Parker v. Taylor*, 103.

FORMER CONVICTION.

Where the trial court sustains a plea of former conviction and enters a judgment of not guilty, without striking out the jury's verdict of guilty, it may, on reversal, proceed to enter judgment of conviction. *State v. Taylor*, 755.

A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the state for an assault. *State v. Tayor*, 755.

Where the court sustains a plea of former conviction after the jury has returned a verdict of guilty, the proper practice is to strike out the verdict and sustain the plea as upon a demurrer by the state; and to enter a judgment of not guilty on the verdict as rendered is improper. *State v. Taylor*, 755.

FORMER JEOPARDY.

A conviction on an indictment for breaking and entering a dwelling with the intent to commit a felony will sustain a plea of former jeopardy on an indictment for burglary based on the same facts. *State v. Staton*, 642.

FORNICATION AND ADULTERY.

In a prosecution for fornication and adultery one defendant may be convicted and the other acquitted. *State v. Simpson*, 676.

FRAUD. See "Mistake"; "Undue Influence."

A charter of a corporation cannot be collaterally attacked as being fraudulent. *Railroad v. Newton*, 132.

Where there is evidence of fraud, it is not error for the trial judge to instruct that there was evidence of fraud, though there was no issue as to fraud. *Newberry v. Railroad*, 45.

It is sufficient to charge, as to undue influence or fraud, that the law scrutinizes transactions between guardian and ward, and that the burden is on the guardian to show that all his transactions with his ward are fair. *Hart v. Cannon*, 10.

FRAUD—*Continued.*

Where a complaint in an action to recover premiums alleges fraudulent misrepresentations as to the earnings of the company and the application thereof, it is proper to submit an issue as to fraud. *Smallwood v. Ins. Co.*, 15.

The bare fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in the deed. *Hart v. Cannon*, 10.

FRAUDS, STATUTE OF.

Standing trees are a part of the realty and are not the subject of poral conveyance, and any evidence thereof is not competent. *Drake v. Howell*, 162.

FRAUDULENT CONVEYANCES. See "Sales."

A debtor sold to a creditor goods found to be of the value of $227 in payment of a claim of $240. Subsequently the debtor made an assignment for the benefit of his creditors, reserving his right to exemptions. In an action by the assignee against the creditor a judgment for the defendant was not error, as the sale was good as between the debtor and creditor, and if plaintiff had been permitted to recover the goods it would merely be for the benefit of the debtor. *Murray v. Williamson*, 318.

G.

GAMING.

In an indictment for keeping a common gaming house the use of the word "gaming" is sufficient. *State v. Morgan*, 743.

The privilege of refusing to answer an incriminating question is personal to the witness, and can be claimed by him only. *State v. Morgan*, 743.

In a prosecution for gaming a witness may be compelled to testify although his answer tends to criminate him, he being pardoned for the offense under The Code, sec. 1215. *State v. Morgan*, 743.

It is not a misjoinder of offenses to charge in an indictment the keeping and maintaining a gaming house and playing cards for money. *State v. Morgan*, 743.

GENERAL ASSEMBLY. See "Acts"; "Statutes"; "The Code."

The journals of the general assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. *Wilson v. Markley*, 616.

A copy of the journal of the legislature deposited with the secretary of state is not evidence for any purpose, and a misnomer of a

GENERAL ASSEMBLY—*Continued.*

town in a private act therein does not affect the validity of the act. *Wilson v. Markley*, 616.

The journal of the legislature is competent evidence only for the purpose of ascertaining whether a law had been passed in accordance with the constitution, article 2, section 14, requiring it to be read three times on three different days in each house and the yeas and nays to be entered on the second and third reading. *Wilson v. Markley*, 616.

GRAND JURY. See "Jury"; "Indictments."

The facts in this case show that the bill of indictment was returned in open court. *State v. Ledford*, 714.

Under The Code, sec. 404, 921, acts 1901, chs. 28, 29, and acts 1903, ch. 533, a grand jury may be summoned for the term of the superior court for New Hanover county held on the fifth Monday after the first Monday in March. *State v. Lew*, 664.

GUARDIAN AND WARD.

It is sufficient to charge, as to undue influence or fraud, that the law scrutinizes transactions between guardian and ward, and that the burden is on the guardian to show that all his transactions with his ward are fair. *Hart v. Cannon*, 10.

A court of equity may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk of the court. *Duffy v. Williams*, 195.

A finding by a referee that a guardian rented the lands of the ward privately, and that the interest of the ward did not require a public rental thereof, is a conclusion of law. The referee should have found whether any injury came to the ward by the private rental. *Duffy v. Williams*, 195.

H.

HARMLESS ERROR.

Where an objection to evidence is improperly sustained, but the same evidence is subsequently admitted, it is harmless error. *Summerlin v. Railroad*, 550.

Where in an action on a note executed pursuant to a contract to convey land, the jury finds that plaintiff did not contract as alleged by defendant, the refusal to instruct that if plaintiff did not complete his contract with defendant, and defendant demanded a rescission, plaintiff could not recover, is not harmful to defendant. *Joines v. Johnson*, 487.

HOMESTEAD. See "Exemption."

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them by adverse possession may be tacked to that of the husband. *Atwell v. Shook*, 387.

Acts 1901, ch. 612, giving two years within which to allot a homestead and thereby preventing the running of the statute of limitations against a judgment, does not apply to judgments taken more than ten years before the passage of the said act. *Farrar v. Harper*, 71.

Acts 1885, ch. 359, does not suspend the running of the statute of limitations on a judgment until there has been an actual allotment of the homestead. *Farrar v. Harper*, 71.

The assignee in an assignment for the benefit of creditors, the grantor in the assignment having retained his homestead, may, upon the death of the grantor, sell the homestead to pay the debts, though such debts are barred by limitation. *Robinson v. McDowell*, 182.

HOMICIDE. See "Accomplices"; "Arrest"; "Dying Declarations"; "Opinion"; "Evidence"; "Self-defense."

In a prosecution for murder, evidence that the accused, who was a foreman of a lumber camp, had not sent the deceased sufficient dinner on the day of the killing, is irrelevant. *State v. Castle*, 769.

Where a person indicted for murder procured a witness to aid in the commission of the homicide, statements made by him to the witness at the time are competent as a part of the *res gestae*. *State v. Register*, 747.

The evidence in this case is sufficient to justify the refusal of the trial judge to instruct the jury that there was no evidence of murder in the first degree, or second degree, or manslaughter. *State v. Boggan*, 761.

Where, on a prosecution for murder, the court charged that defendant was justified in meeting force with force, it was error to add, "But you are to judge of the force necessary, and not the prisoner," since the jury should merely find whether he did more than a reasonable man should have done. *State v. Castle*, 769.

In a prosecution for murder, the defense being self-defense, an instruction that the burden is on the defendant to show facts necessary to excuse or mitigate the homicide and that the same must be to the satisfaction of the jury is erroneous, as the

HOMICIDE—*Continued.*

defendant is entitled to rely on the evidence of state, if any, to mitigate or excuse the homicide. *State v. Castle*, 770.

In a prosecution for murder it was error to charge that if defendants went to the room of deceased to discharge them and they entered into a sudden quarrel and killed the deceased men they would be guilty of manslaughter, there being no evidence of a sudden quarrel. *State v. Castle*, 770.

Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a juror selected from a special venire ordered in the case. *State v. Register*, 747.

On a prosecution for murder it was error to instruct that if the provocation was great the crime would be but manslaughter, but if slight and the killing done out of proportion to the provocation it would be murder in the second degree, there being no slight provocation in evidence. *State v. Castle*, 770.

On a prosecution for murder, it was error to charge that it was incumbent on defendant to first use gentle and mild means, and that if he used more force than was necessary and the deceased could have been ejected without it, he would be guilty of murder in the second degree, since the instruction made the right of self-defense turn on the necessity for the force used, without reference to whether it reasonably appeared necessary. *State v. Castle*, 770.

HUSBAND AND WIFE. See "Married Women."

Where a *feme sole* assigns stock in blank and after marriage new stock is issued to her, and she assigns the same to the same parties without assuming control thereof, such assignment is valid without the consent of the husband. *Cox v. Dowd*, 637.

In an action on a note seeking to charge her personal estate, the wife and husband must be joined as parties defendant. *Harvey v. Johnson*, 352.

No judgment can be rendered against a husband who is joined with his wife in an action under The Code, sec. 178. *Harvey v. Johnson*, 352.

In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. *Harvey v. Johnson*, 352.

A note signed by husband and wife without a privy examination of the wife cannot be enforced against her separate real estate. *Harvey v. Johnson*, 352.

HUSBAND AND WIFE—*Continued.*

The superior court has jurisdiction of an action seeking to charge the separate estate of the wife, though the note sued on is less than $200. *Harvey v. Johnson*, 352.

Acts 1891, ch. 91, requiring the private examination of a married woman to a chattel mortgage on household and kitchen furniture, does not apply to a note signed by husband and wife binding her separate personal estate. *Harvey v. Johnson*, 353.

Where land is conveyed to a trustee, who is to pay the rents to a married woman, the wife of the grantor, the *cestui que trust* may compel the conveyance of the legal estate to herself at any time, and hence the trustee is not liable for rents and profits received by the husband of the *cestui que trust*. *Perkins v. Brinkley*, 154.

I.

IMPEACHMENT OF WITNESSES. See "Witnesses."

An indictment against a witness who had turned state's evidence is not admissible to impeach him. *State v. Register*, 747.

INCOME TAX. See "Taxation."

A state cannot tax the salary of a federal officer. *Purnell v. Page*, 125.

INDEPENDENT CONTRACTOR.

Where the damage caused by an excavation might have been reasonably anticipated, the owner of land upon which the excavation is made is liable therefor, though the negligence was that of an independent contractor. *Davis v. Summerfield*, 325.

The employment of an independent contractor to make an excavation adjacent to an abutting owner's wall does not relieve the proprietor from the obligation to give the adjacent owner timely notice of the nature and extent of the intended excavation. *Davis v. Summerfield*, 325.

INDICTMENTS. See "Amendments"; "Arrest of Judgment."

Evidence that the accused sold three pints of liquor does not sustain the charge of a sale by a measure less than a quart. *State v. Holder*, 710.

In a prosecution for the sale of intoxicating liquors without a license the indictment should negative the accused having license to sell. *State v. Holder*, 710.

Where an indictment charges in one count larceny and in another the receiving of stolen goods, and the instructions relate only

INDICTMENTS—*Continued.*

to the first count, and the defendant is found guilty on the second count, a new trial will be granted. *State v. Adams*, 667.

The bill of indictment for burglary in this case sufficiently charges the intent with which the breaking was done. *State v. Staton*, 642.

It is not a misjoinder of offenses to charge in an indictment the keeping and maintaining a gaming house and playing cards for money. *State v. Morgan*, 743.

In an indictment for keeping a common gaming house the use of the word "gaming" is sufficient. *State v. Morgan*, 743.

A defendant waives his right to object that an indictment was not returned in open court when he pleads and moves for a severance before having moved to quash the bill. *State v. Ledford*, 714.

The facts in this case show that the bill of indictment was returned in open court. *State v. Ledford*, 714.

Where there is more than one count in a bill of indictment, and there is a general verdict, the verdict is on each count, and if there is a defect in one or more of the counts the verdict will be imputed to the sound count. *State v. Holder*, 709.

INJURY TO PROPERTY.

In an action for removing a fence from a cultivated field the defendant cannot, as a defense, show title in himself, the prosecutor being in actual quiet possession. *State v. Campbell*, 640.

Under The Code, a cultivated field is one kept and used for cultivation according to the ordinary course of husbandry, and the smallness of the tract makes no difference. *State v. Campbell*, 640.

In an indictment for pulling down and removing a fence surrounding a cultivated field it is not competent for the defendant to show that he did the act as the agent of another person. *State v. Campbell*, 640.

INJURY TO STOCK.

Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. *Baker v. Railroad Co.*, 31.

INJUNCTIONS. See "Contempt."

In an action to quiet title to land, an injunction having been issued to prevent the defendant from cutting timber, the plaintiff may

INJUNCTIONS—*Continued.*

take a non-suit, although the defendant claimed damages by reason of the injunction. *Olmsted v. Smith*, 584.

An injunction will not lie to restrain a railroad company from entering upon land before the appraisement of damages and the payment thereof. *Railroad v. Newton*, 132.

A tax payer may maintain an injunction to prevent the sale of his property under an illegal tax, or he may pay the tax under protest and sue to recover it. *Purnell v. Page*, 125.

Where the plaintiffs alleged that defendant, a public sewer corporation, had contracted to furnish sewer facilities to plaintiffs and other lot owners in consideration of an initial payment of $50 for connections and an annual rental of $2, and that by a change in defendant's by-laws the annual charge had been increased, that such new rental was unreasonable and exorbitant, and that defendant was discriminating in such change in favor of some patrons and against others, and had threatened that unless plaintiffs paid the increased rate their connections would be cut off, the effect of which would be to cause plaintiffs irreparable damage. Defendant answered, admitting the raise, denying that the new rate was unreasonable and that any discrimination existed. On such pleadings alone an order refusing to dissolve a temporary injunction and continuing the same until the trial was proper. *Solomon v. Sewerage Co.*, 144.

INSTRUCTIONS. See "Exceptions and Objections"; "Verdict."

An objection to a certain instruction on the ground that there was no evidence to support it cannot be reviewed, unless all of the evidence is contained in the record. *Atwell v. Shook*, 387.

The statute of limitations, if relied on by the accused, should be specifically brought to the attention of the trial judge by a plea or a request to instruct. *State v. Holder*, 709.

The trial judge should not give an instruction not supported by the evidence. *Joines v. Johnson*, 487.

In an action to recover damages for a personal injury, it is error for the trial judge, in his instructions, to say to the jury "Was it due care to put the boy in charge of the engine without warning?" where the main question in dispute was whether the boy was in charge of the engine without having been properly warned. *Marcus v. Loane*, 54.

Where there is evidence of fraud, it is not error for the trial judge to instruct that there was evidence of fraud, though there was no issue as to fraud. *Newberry v. Railroad*, 45.

INSTRUCTIONS—*Continued.*

It is error to instruct the jury that because of interest they should carefully scrutinize the evidence of defendants, *without adding* that if the jury believe the evidence it should have the same weight as if the witness was not interested. *State v. Graham*, 645.

In a prosecution for murder it was error to charge that if defendants went to the room of deceased to discharge them and they entered into a sudden quarrel and killed the deceased men they would be guilty of manslaughter, there being no evidence of a sudden quarrel. *State v. Castle*, 770.

A "broadside" exception to a charge will not be considered on appeal. *State v. Register*, 747.

On a prosecution for murder it was error to instruct that if the provocation were great the crime would be but manslaughter, but if slight, and the killing done out of proportion to the provocation, it would be murder in the second degree, there being no slight provocation in evidence. *State v. Castle*, 770.

It is improper to instruct the jury that "if they believe from the evidence" certain facts, then certain consequences will follow. The language should be: "if they find from the evidence." *Sossamon v. Cruse*, 470.

An exception to a charge which does not specify the ground of objection is too general to be considered. *Joines v. Johnson*, 487.

An instruction containing a statement of a fact upon which the evidence is conflicting should not be given. *Davis v. Summerfield*, 325.

INSURANCE.

Under the facts of this case the delay in payment of the proper amount of premium is not such as to deprive the policy-holder of the right to pay that amount and have his policy continued. *Smallwood v. Insurance Co.*, 15.

Where a complaint in an action to recover premiums alleges fraudulent misrepresentation as to the earnings of the company and the application thereof, it is proper to submit an issue as to fraud. *Smallwood v. Insurance Co.*, 15.

Where an insurance company, by inadvertence, sends notice to a policy-holder for a less premium than that due, it is not estopped, upon discovery of the error, from collecting the proper amount. *Smallwood v. Insurance Co.*, 15.

The beneficiary of a life policy, who was indebted to the estate of decedent in a greater amount than his share of the insurance

INSURANCE—*Continued.*

money which he and the other beneficiaries allowed to be applied to the payment of a mortgage on decedent's realty, could not claim any part of the funds in the hands of the executor of decedent as creditor by reason of such payment. *Johnston v. Cutchin*, 119.

The taking of clothing by the agent of a fire insurance company in part payment of the premium of a policy is a fraud upon the company, and no valid contract as to the company arises from such a transaction. *Folb v. Insurance Co.*, 179.

The failure to file proofs of loss within the time required by a policy does not work a forfeiture thereof, but unless waived by the company no action can be brought until the expiration of the required time after the filing of the proofs. *Gerringer v. Insurance Co.*, 407.

A person holding an equitable interest in property, such interest being known to the agent of the company, has an insurable interest therein. *Gerringer v. Insurance Co.*, 407.

A mutual life insurance association cannot by changing its by-laws lessen the value of a policy by reducing the amount of indemnity. *Makely v. Legion of Honor*, 367.

The holder of a policy of insurance which has been illegally reduced by the company is entitled to sue for the premiums paid and the interest thereon. *Makely v. Legion of Honor*, 367.

The holder of a policy of insurance does not waive the right to sue for the premiums paid on the policy by paying premiums on the amount to which such policy had been illegally reduced if he objected to the reduction. *Makely v. Legion of Honor*, 367.

Where a policy of insurance provides that the company will, upon death of the insured, pay not exceeding $5,000, and it receives premiums on the full amount, the policy is in legal effect for $5,000. *Makely v. Legion of Honor*, 368.

The denial of liability by a fire insurance company dispenses with the necessity of filing proofs of loss. *Gerringer v. Insurance Co.*, 407.

INTENT. See "Homicide"; "Malice"; "Presumptions."

A conviction on an indictment for breaking and entering a dwelling with the intent to commit a felony will sustain a plea of former jeopardy on an indictment for burglary based on the same facts. *State v. Staton*, 642.

The objection that there is not sufficient evidence of the intent with

INTENT—*Continued.*

which the defendant entered a dwelling must be taken before verdict. *State v. Staton*, 643.

In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the state to show beyond a reasonable doubt the intent to defraud. *State v. McDonald*, 680.

The bill of indictment for burglary in this case sufficiently charges the intent with which the breaking was done. *State v. Staton*, 642.

INTEREST. See "Usury."

A judgment for taxes should include interest on the amount due. *Wilmington v. McDonald*, 548.

INTERNAL REVENUE.

A promissory note, though not stamped with a revenue stamp as required by a federal statute, may be used in evidence. *Davis v. Evans*, 320.

A purchaser claiming land under a sale for internal revenue taxes against the owner cannot sustain his title under the deed of the collector if he fails to show independently of the mere recitals in the record or in his deed that a return was made by the person liable to be assessed, or that the commissioner of internal revenue had made the assessment, or that a warrant of distraint had been issued, or that a certificate of purchase had been given to the purchaser at the sale. *Stewart v. Pergusson*, 276.

INTERPLEADER. See "Pleadings."

In an attachment by a vendee against the vendor of goods, the vendor making no defense, the only issue between the vendee and an interpleader is whether the interpleader is the owner and entitled to the possession of the goods. *Manufacturing Co. v. Tierney*, 630.

In attachment the burden of showing title to property is on the interpleader. *Manufacturing Co. v. Tierney*, 630.

In attachment, an interpleader having introduced a bill of lading for the property and draft attached properly endorsed, the presumption is that the interpleader is a purchaser for value without notice. *Manufacturing Co. v. Tierney*, 631.

INTOXICATING LIQUORS. See "Licenses."

Evidence that the accused sold three pints of liquor does not sustain the charge of a sale by a measure less than a quart. *State v. Holder*, 710.

Where a clerk in a drug store unlawfully sells intoxicating liquor

INTOXICATING LIQUORS—*Continued.*

without the knowledge and against the orders of the owner, the the owner is not liable for the act of the clerk. *State v. Neal*, 689.

In a prosecution for the sale of intoxicating liquors without a license the indictment should negative the accused having license to sell. *State v. Holder*, 709.

Acts 1900, ch. 17, authorizing judges of the superior court to grant license to sell intoxicating liquors in a certain county, is repealed by acts 1901, ch. 9, sec. 76, giving exclusive right to grant license to the county commissioners. *In re Burgwyn*, 115.

ISSUES. See "Verdicts"; "Pleadings."

In an action by a tenant against his landlord and another tenant for damages caused by water leaking from a pipe it was error to submit the issue as to whether the plaintiff was injured by the defendants, or either of them, as an affirmative answer thereto would be indefinite. *Pearce v. Fisher*, 333.

In a suit against devisees and executors for specific performance of a contract to devise certain land, it is proper to submit to the jury whether testator devised the land as he contracted. *Price v. Price*, 474.

Where a complaint in an action to recover premiums alleges fraudulent misrepresentations as to the earnings of the company and the application thereof, it is proper to submit an issue as to fraud. *Smallwood v. Insurance Co.*, 15.

In condemnation proceedings a land owner is not entitled at the hearing before the clerk to have issues tried by a jury. *Railroad v. Newton*, 132.

The issue, "What damages, if any, plaintiff is entitled to recover," in an action for the recovery for services rendered a decedent under a special contract, does not present to the jury all the matters in controversy. *Hatcher v. Dabbs*, 237.

Where there is evidence of fraud it is not error for the trial judge to instruct that there was evidence of fraud, though there was no issue as to fraud. *Newberry v. Railroad Co.*, 45.

Where an action is for malicious prosecution and illegal arrest, and an issue is submitted as to each, two issues should be submitted as to damages. *Kelly v. Traction Co.*, 418.

Where an issue is general, embracing within its scope several distinct tracts of land, a new trial thereon must be general. *Rowe v. Lumber Co.*, 433.

In an attachment by a vendee against the vendor of goods, the ven-

ISSUES—*Continued.*

dor making no defense, the only issue between the vendee and an interpleader is whether the interpleader is the owner and entitled to the possession of the goods. *Manufacturing Co. v. Tierney,* 630.

In an action for the death of plaintiff's decedent, the issues "What was the expectancy of life of plaintiff's intestate?" and "What would have been his accumulation arising from his net income for that period?" should not be given in lieu of the issue "What damage is the plaintiff entitled to recover?" *Watson v. Railroad,* 188.

J

JUDGMENTS. See "Executions"; "Jurisdiction."

On appeal to the superior court from an order of a justice denying a motion to open a default judgment, the court may disregard the justice's finding of fact and hear the matter anew. *Turner v. Machine Co.,* 381.

Where the defendant, in an appeal from a justice of the peace, fails to appear in the superior court, having answered and raised a material issue, no judgment can be entered against him without a trial. *Barnes v. Railroad,* 130.

Where the trial court sustains a plea of former conviction and enters a judgment of not guilty, without striking out the jury's verdict of guilty, it may, on reversal, proceed to enter judgment of conviction. *State v. Taylor,* 755.

The failure to certify to the clerk of the superior court of the county in which the land lies a levy thereon, in an attachment proceeding, does not invalidate such levy. *Evans v. Alridge,* 378.

In an action to recover land purchased under a judgment recovered against defendant's non-resident grantor, plaintiff could not recover, in the absence of proof of the grantor's personal appearance or publication of summons after attachment. *Evans v. Alridge,* 378.

In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. *Harvey v. Johnson,* 352.

A levy on land located in another county than that in which the judgment was obtained may be made without docketing a transcript of the judgment in the county where the land lies. *Evans v. Alridge,* 378.

Where the court sustains a plea of former conviction after the jury

JUDGMENTS—*Continued.*

has returned a verdict of guilty, the proper practice is to strike out the verdict and sustain the plea as upon a demurrer by the state; and to enter a judgment of not guilty on the verdict as rendered is improper. *State v. Taylor*, 755.

Where ancillary proceedings of attachment are brought with the main action, and the attachment is not discharged, it is not error to condemn the attached property for sale to pay the judgment, as the sheriff would be required to sell the same upon issuance of execution. *Manufacturing Co. v. Steinmetz*, 192.

The waiver of a jury trial by consent, or that judgment may be entered out of term, must be in writing, filed with the papers in the case, or by oral consent entered on the minute docket of the court. *Hahn v. Brinson*, 7.

Where an action is brought to restrain a sale under a mortgage on account of alleged usury, and it is removed to the federal court and the amount in controversy is adjudicated, the judgment therein is a bar to a subsequent action by the mortgagor for alleged usury in the mortgage. *Best v. Mortgage Co.*, 20.

Acts 1885, ch. 359, does not suspend the running of the statute of limitations on a judgment until there has been an actual allotment of the homestead. *Farrar v. Harper*, 71.

Acts 1901, ch. 612, giving two years within which to allot a homestead and thereby preventing the running of the statute of limitations against a judgment, does not apply to judgments taken more than ten years before the passage of the said act. *Farrar v. Harper*, 71.

On appeal from a refusal to set aside a judgment by default and inquiry on the ground of excusable neglect, affidavits will not be considered; the findings of fact by the judge being conclusive. *Osborn v. Leach*, 427.

The facts in this case are not sufficient to justify the setting aside of a judgment by default and inquiry. *Osborn v. Leach*, 427.

A judgment by default and inquiry merely admits a cause of action, and carries only nominal damages and costs; the burden of proving any damages beyond a penny being still upon plaintiff. *Osborn v. Leach*, 428.

A defendant against whom a default judgment has been taken is not entitled to have the default opened and judgment set aside merely because he has a meritorious defense, if his failure to assert it was not due to excusable neglect. *Osborn v. Leach*, 427.

An appeal from a judgment on the report of a referee overruling

JUDGMENTS—*Continued.*

exceptions thereto will be treated as an exception to the judgment based upon the conclusion of fact by the referee. *Miller v. Coxe*, 578.

No judgment can be rendered against a husband who is joined with his wife in an action under The Code, sec. 178. *Harvey v. Johnson*, 352.

On a motion to set aside a judgment, if the court finds the movant guilty of inexcusable neglect, it need not find whether the defendant had a meritorious defense. *Turner v. Machine Co.*, 381.

A non-resident corporation, against which a default judgment was obtained after service by publication, is not entitled to have the default judgment opened on the ground that it had no notice of the pendency of the suit unless it shows that it exercised due diligence. *Turner v. Machine Co.*, 381.

JURISDICTION. See "Venue."

In this action of claim and delivery for a deed there is no evidence that the title to land is involved, and the jurisdiction of the justice of the peace is not ousted. *Pasterfield v. Sawyer*, 42.

Where a complaint in claim and delivery before a justice of the peace alleges the value of the property to be less than fifty dollars, and the answer does not deny the allegation, no proof of the value is necessary. *Pasterfield v. Sawyer*, 42.

Where a person is convicted in the superior court of an offense of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. *State v. Fritz*, 725.

Where there is an indictment in the superior court for an offense of which it has original jurisdiction, and a lesser offense is proved, it will retain jurisdiction, although it does not have original jurisdiction of the lesser offense. *State v. Fritz*, 725.

The Code, sec. 194, subsec. 2, authorizes an action against a foreign corporation by a non-resident plaintiff where the cause of action arises in this state. *Bryan v. Telegraph Co.*, 603.

The liability for non-delivery of a telegram in another state under a contract made in this state is determined by the law of the latter state. *Bryan v. Telegraph Co.*, 603.

The clerk of the superior court has no jurisdiction of an action to sell property for reinvestment, etc., under acts 1903, ch. 99, but when carried to the superior court on appeal it will be retained for a hearing. *Smith v. Gudger*, 627.

It is the statement in good faith of a cause of action within the

JURISDICTION—*Continued.*

jurisdiction of the court that confers jurisdiction, and this jurisdiction, once acquired, is not lost by any subsequent elimination of the allegations of the complaint essential to its existence. *Shankle v. Ingram*, 255.

The superior court has jurisdiction of an action seeking to charge the separate estate of the wife, though the note sued on is less than $200. *Harvey v. Johnson*, 353.

The superior court has no jurisdiction of an action on a note for $275; but on which the balance was less than $200. *Harvey v. Johnson*, 352.

JURY. See "Grand Jury"; "Former Jeopardy"; "Questions for Jury"; "Verdict."

The fact that a jury had an opportunity to see the locality where the homicide is alleged to have been committed, and there is no evidence that any remarks were made among the jurors themselves or the officer attending them as to the condition and appearance of the place, is not sufficient to justify the granting of a new trial, the trial judge having declined to set aside therefor a verdict of guilty. *State v. Boggan*, 761.

The finding of the trial judge that jurors were indifferent is not reviewable on appeal. *State v. Register*, 747.

A finding by the trial judge that persons drawn on a special venire were not freeholders is conclusive on appeal. *State v. Register*, 746.

Either party to a civil action is entitled to have the jury polled. *Smith v. Paul*, 66.

Where the defendant in a partition proceeding fails to ask for a jury trial until after the clerk has ordered partition, he thereby waives the right thereto. *Navigation Co. v. Worrell*, 93.

Under The Code, secs. 404, 921, acts 1901, chs. 28, 29, and acts 1903, ch. 533, a grand jury may be summoned for the term of the superior court for New Hanover county held on the fifth Monday after the first Monday in March. *State v. Lew*, 664.

JUSTICES OF THE PEACE. See "Jurisdiction."

Where a complaint in claim and delivery before a justice of the peace alleges the value of the property to be less than fifty dollars, and the answer does not deny the allegation, no proof of the value is necessary. *Pasterfield v. Sawyer*, 42.

In this action of claim and delivery for a deed there is no evidence that the title to land is involved, and the jurisdiction of the justice of the peace is not ousted. *Pasterfield v. Sawyer*, 42.

JUSTICES OF THE PEACE—*Continued.*

Where the defendant, in an appeal from a justice of the peace, fails to appear in the superior court, having answered and raised a material issue, no judgment can be entered against him without a trial. *Barnes v. Railroad*, 130.

Where a person is convicted in the superior court of an offense of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. *State v. Fritz*, 725.

Where plaintiff executed a deed to a third person and accepted a mortgage from defendant to secure the purchase money, the plaintiff, acting as a justice of the peace, was not incompetent to acknowledge a transfer by such third person of his deed to defendant. *Joines v. Johnson*, 487.

On appeal to the superior court from an order of a justice denying a motion to open a default judgment, the court may disregard the justice's finding of fact and hear the matter anew. *Turner v. Machine Co.*, 381.

The superior court has no jurisdiction of an action on a note for $275; but on which the balance was less than $200. *Harvey v. Johnson*, 352.

L

LARCENY. See "Receiving Stolen Property."

Where an indictment charges in one count larceny and in another the receiving of stolen goods, and the instructions relate only to the first count, and the defendant is found guilty on the second count, a new trial will be granted. *State v. Adams*, 667.

Acts 1895, ch. 285, limiting the punishment in certain cases of larceny, is not applicable to larceny from the dwelling by breaking and entering in the day-time. *State v. Hullen*, 656.

In an indictment for larceny of goods from a dwelling in the day-time, recent possession by the defendant of the stolen goods is a circumstance tending to prove that the defendant entered the dwelling from which the goods were stolen. *State v. Hullen*, 656.

In an indictment for larceny, evidence that the defendant had in his possession goods stolen at the same time at which those were stolen for which he was indicted is competent. *State v. Hullen*, 656.

On a trial for stealing money from prosecutor while drunk, the state having, as a basis for the argument that defendant was preparing to take it, shown that after taking it from prosecutor's

LARCENY—*Continued.*

pocket, at his request, to pay for the liquor, he, in putting it back, called the attention of the clerk to the fact, he, to explain this conduct, may show that prosecutor was in the habit of losing money while drunk and wrongfully accusing people of stealing it, and that he knew of this habit. *State v. Lewis*, 653.

LEGACIES AND DEVISES. See "Undue Influence"; "Wills."

In a suit against devisees and executors for specific performance of a contract to devise certain land, it is proper to submit to the jury whether testator devised the land as he contracted. *Price v. Price*, 494.

Where a testator contracts to devise certain lands to his children, "with limitations," he may attach such limitations as are in his judgment proper. *Price v. Price*, 494.

The heirs of a testator, and not the residuary legatees, take property included in a lapsed specific devise, unless it appears that the testator intended it otherwise. *Holton v. Jones*, 399.

Where realty is devised to a person and her children during their lifetime and then to go to her grandchildren, on default of grandchildren *in esse* at the death of testator the fee vests in the heirs at law of the testator to the use of any grandchildren who might thereafter be born. *Holton v. Jones*, 399.

LEGAL CONCLUSIONS.

A finding by a referee that a guardian rented the lands of the ward privately, and that the interest of the ward did not require a public rental thereof, is a conclusion of law. The referee should have found whether any injury came to the ward by the private rental. *Duffy v. Williams*, 195.

LIBEL AND SLANDER.

The facts in this action for slander are not sufficient to justify a recovery as against the defendant corporation. *Hudnell v. Lumber Co.*, 169.

Where defendant alleged that he had stated to plaintiff, in the presence of another, that plaintiff should be careful concerning his speech; that others had stated that he had committed perjury, and that defendant had endeavored to stop a prosecution against plaintiff in good faith, a requested instruction in an action for slander that such words were actionable *per se*, unless true, and that the law presumes malice, was properly refused. *Hudnell v. Lumber Co.*, 169.

Where defendant, on meeting plaintiff, stated to him that he should be careful how he spoke; that others had stated that he had

LIBEL AND SLANDER—*Continued.*

committed perjury, and that defendant, as plaintiff's friend, had tried to stop the prosecution of plaintiff, and defendant alleged that such statement was made in the honest belief that he was performing a moral and social duty toward the plaintiff for his benefit, the statement was privileged. *Hudnell v. Lumber Co.*, 169.

LICENSES. See "Physicians and Surgeons"; "Intoxicating Liquors."

Acts 1900, ch. 17, authorizing judges of the superior court to grant license to sell intoxicating liquors in a certain county, is repealed by acts 1901, ch. 9, sec. 76, giving exclusive right to grant license to the county commissioners. *In re Burgwyn*, 115.

In an action against a register of deeds for issuing license for the marriage of a girl under eighteen, the facts being found by the jury or undisputed, it is for the trial court to say whether they show reasonable inquiry. *Trolinger v. Boroughs*, 312.

The evidence in this case is not sufficient to show reasonable inquiry by a register of deeds as to the legal age of a woman to marry. *Trolinger v. Boroughs*, 312.

In a prosecution for the sale of intoxicating liquors without a license the indictment should negative the accused having license to sell. *State v. Holder*, 709.

Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. *State v. Neal*, 687.

Under a special verdict finding that the defendant advertises himself as a non-medical physician, curing disease by a system of drugless healing and treating patients by such system without medicine, claiming not to cure by faith but by natural methods, without medicine or surgery; and that he administers massage, baths and physical culture, manipulates the muscles, bones, spine and solar plexus, and kneads the muscles with the fingers of the hand, writes no prescriptions as to diet, but advises his patients what to eat and what not to eat, the defendant is not guilty of practicing medicine without license, though he admits that he was not licensed to practice medicine by the state medical board; that he charges fees for his services, and does not claim exemption as a nurse, midwife, or as curing by prayer. *State v. Biggs*, 729.

LIFE INSURANCE. See "Insurance."

LIMITATIONS OF ACTIONS. See "Actions."

The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. *Miller v. Coxe*, 578.

The statute of limitations, if relied on by the accused, should be specifically brought to the attention of the trial judge by a plea or a request to instruct. *State v. Holder*, 709.

The statute of limitations can only be raised by answer. *Wilmington v. McDonald*, 548.

Acts 1901, ch. 612, giving two years within which to allot a homestead and thereby preventing the running of the statute of limitations against a judgment, does not apply to judgments taken more than ten years before the passage of the said act. *Farrar v. Harper*, 71.

Acts 1885, ch. 359, does not suspend the running of the statute of limitations on a judgment until there has been an actual allotment of the homestead. *Farrar v. Harper*, 71.

The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations. *Stancill v. Spain*, 76.

In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. *Stancill v. Spain*, 77.

An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the co-tenant then out of possession. *Locklear v. Bullard*, 260.

In an action for the breach of a covenant of warranty the statute of limitations begins to run when there is an ouster of the grantee. *Shankle v. Ingram*, 254.

In an action for damages for breach of covenant of seizin the statute of limitations begins to run upon delivery of the deed. *Shankle v. Ingram*, 254.

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. *Hodges v. Telegraph Co.*, 225.

The assignee in an assignment for the benefit of creditors, the grantor in the assignment having retained his homestead, may, upon the death of the grantor, sell the homestead to pay the debts, though such debts are barred by limitation. *Robinson v. McDowell*, 182.

A personal representative cannot sell land to pay debts barred by limitation. *Robinson v. McDowell*, 182.

LIMITATIONS OF ACTIONS—*Continued.*

Where it is discretionary with the trustee in a deed of trust as to the time of the sale of property therein assigned, the same may be sold, though the debts secured are barred by the statute of limitations. *Robinson v. McDowell*, 182.

A second mortgagee cannot have the first mortgage cancelled because it is barred by the statute of limitations. *Miller v. Coxe*, 578.

Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. *Miller v. Coxe*, 578.

Part payment by an assignee in bankruptcy of a debt referred to in the assignment does not arrest the running of the statute of limitations against the debt. *Robinson v. McDowell*, 182.

LOCAL ASSESSMENTS.

The road-bed and right of way of a railroad are liable to an assessment for local improvements. *Commissioners v. Railroad*, 216.

An assessment levied by county commissioners for the purpose of local taxation, based upon the valuation of the corporation commission, cannot be sustained. *Commissioners v. Railroad*, 216.

Acts 1903, ch. 554, if regarded as an act authorizing the imposition of special assessments, is invalid, because it authorizes assessments on the real estate of the entire county, including the real estate of the township withdrawn from the benefits of the stock law, and which would receive no benefits from the fences erected by the commissioners. *Harper v. Commissioners*, 106.

Acts 1903, ch. 554, cannot be held valid so far as it authorizes the commissioners to erect fences when necessary and to draw out of the general fund of the county money to pay for the same, and invalid so far as it authorizes the imposition of a tax or assessment to replace the money so used, for the court cannot presume that the legislature would have directed the expense of building the fences to be taken out of the general fund without also making provision for replacing the money withdrawn. *Harper v. Commissioners*, 106.

The Code, sec. 2824, providing that for the purpose of building stock law fences the county commissioners may levy a special assessment on all taxable real estate "within the county, township or district which may adopt the stock law," does not authorize the imposition of an assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of

LOCAL ASSESSMENTS—*Continued.*

fences erected by the commissioners. *Harper v. Commissioners*, 107.

M

MALICE. See "Homicide"; "Intent."

In an action for malicious prosecution a statement of the defendant that he would spend one thousand dollars to have his revenge is some evidence of malice. *Coble v. Huffines*, 422.

In an action for malicious prosecution, an order in the criminal prosecution designating defendant as the prosecutor, and taxing him with the costs, is not admissible against him either to show malice or the want of probable cause. *Coble v. Huffines*, 422.

Where the plaintiff in an action for malicious prosecution was acquitted on two separate indictments, the prosecutions must be identical, and the second must have been instituted without any evidence additional to that produced at the trial of the first, in order to show the absence of probable cause and to raise the presumption of malice. *Coble v. Huffines*, 422.

Where defendant alleged that he had stated to plaintiff, in the presence of another, that plaintiff should be careful concerning his speech; that others had stated that he had committed perjury, and that defendant had endeavored to stop a prosecution against plaintiff in good faith, a requested instruction in an action for slander that such words were actionable *per se*, unless true, and that the law presumes malice, was properly refused. *Hudnell v. Lumber Co.*, 169.

MALICIOUS PROSECUTION.

In an action for malicious prosecution a statement of the defendant that he would spend one thousand dollars to have his revenge is some evidence of malice. *Coble v. Huffines*, 422.

In an action for malicious prosecution, an order in the criminal prosecution designating defendant as the prosecutor, and taxing him with the costs, is not admissible against him either to show malice or the want of probable cause. *Coble v. Huffines*, 422.

Where an action is for malicious prosecution and illegal arrest, and an issue is submitted as to each, two issues should be submitted as to damages. *Kelly v. Traction Co.*, 418.

In an action for malicious prosecution it is not necessary to show that the defendant company swore out the warrant, it being sufficient if it directly or indirectly procured it to be issued. *Kelly v. Traction Co.*, 418.

MALICIOUS PROSECUTION—*Continued.*

Where the plaintiff in an action for malicious prosecution was acquitted on two separate indictments, the prosecutions must be identical, and the second must have been instituted without any evidence additional to that produced at the trial of the first, in order to show the absence of probable cause and to raise the presumption of malice. *Coble v. Huffines*, 422.

MANSLAUGHTER. See "Homicide."

MARRIAGE. See "Register of Deeds."

The evidence in this case is not sufficient to show reasonable inquiry by a register of deeds as to the legal age of a woman to marry. *Trolinger v. Boroughs*, 312.

In an action against a register of deeds for issuing license for the marriage of a girl under eighteen, the facts being found by the jury or undisputed, it is for the trial court to say whether they show reasonable inquiry. *Trolinger v. Boroughs*, 312.

MARRIED WOMEN. See "Husband and Wife."

A note signed by husband and wife without a privy examination of the wife cannot be enforced against her separate real estate. *Harvey v. Johnson*, 353.

Acts 1891, ch. 91, requiring the private examination of a married woman to a chattel mortgage on household and kitchen furniture, does not apply to a note signed by husband and wife binding her separate personal estate. *Harvey v. Johnson*, 353.

Where a *feme sole* assigns stock in blank and after marriage new stock is issued to her, and she assigns the same to the same parties without assuming control thereof, such assignment is valid without the consent of the husband. *Cox v. Dowd*, 537.

MASTER AND SERVANT. See "Fellow-servant"; "Negligence."

A person employed by a railroad company to load express hauled by the railroad company for the express company is not a fellow-servant of an employee of the express company. *Hopper v. Express Co.*, 375.

In an action against a railroad company for the death of a freight conductor, killed by being run over by a shifting engine, the question whether the company's failure to have a watchman on the cars attached to the engine was the proximate cause of the accident is, under the evidence, for the jury. *Lassiter v. Railroad*, 244.

MISTAKE. See "Fraud"; "Undue Influence."

A defendant in an action for the recovery of real property cannot show that a deed in the chain of his adversary's title, absolute in form, was a mere mortgage, unless he expressly pleads it. *Locklear v. Bullard*, 260.

It is not error to refuse to charge that the presumption of law that notes were the property of the payee could not be rebutted by the unsupported evidence of the payee that they were executed to him by mistake. *Sallinger v. Perry*, 35.

It is sufficient, on the question of mistake as to the payee in a note, to charge that if the jury are thoroughly satisfied from the evidence that the draftsman of the notes made a mistake in drawing them, and that it was intended that they should be made payable to the claimant and not to the payee in the notes, then they should find accordingly. *Sallinger v. Perry*, 35.

It is not error to refuse to charge that where it is sought to show by parol evidence that notes were executed to the payee by mistake, that the evidence should be received with great caution and the jury should look anxiously for some corroboratory facts and circumstances in support of it, and that the claimant of the note should not delay in the ascertainment of his rights, as a stale claim would merit but little attention. *Sallinger v. Perry*, 35.

MORTGAGES. See "Chattel Mortgages."

In an action on a note to recover the possession of mortgaged property the defendant may set up a counter-claim arising from a breach of a contract. *Lumber Co. v. McPherson*, 287.

Where an action is brought to restrain a sale under a mortgage on account of alleged usury, and it is removed to the federal court and the amount in controversy is adjudicated, the judgment therein is a bar to a subsequent action by the mortgagor for alleged usury in the mortgage. *Best v. Mortgage Co.*, 20.

A second mortgagee cannot have the first mortgage cancelled because it is barred by the statute of limitations. *Miller v. Coxe*, 578.

The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. *Miller v. Coxe*, 578.

The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations. *Stancill v. Spain*, 76.

Where a mortgagee dies pending a suit to foreclose a mortgage, the heirs or devisees of such mortgagee are necessary parties. *Stancill v. Spain*, 76.

MORTGAGES—*Continued.*

The possession of the mortgagor or those holding under him is not adverse to the mortgagee. *Stancill v. Spain*, 77.

The grantees of a mortgagor of a part of the land conveyed in the mortgage are necessary parties to an action for the foreclosure thereof. *Stancill v. Spain*, 76.

In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. *Stancill v. Spain*, 77.

Where the description of land in a mortgage is ambiguous, admissions by the deceased mortgagee are competent to show that certain land was not intended to be included in the mortgage. *Stancill v. Spain*, 76.

Where plaintiff executed a deed to a third person and accepted a mortgage from defendant to secure the purchase money, the plaintiff, acting as a justice of the peace, was not incompetent to acknowledge a transfer by such third person of his deed to defendant. *Joines v. Johnson*, 487.

Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. *Miller v. Coxe*, 578.

Where the beneficiaries of a life policy allowed the proceeds thereof to be applied to the payment of a mortgage on decedent's realty, as directed by decedent's will, they were entitled to the funds in the hands of the executor of decedent as creditors by reason of the payment of their insurance money on the mortgage debt. *Johnston v. Cutchin*, 119.

MUNICIPAL CORPORATIONS. See "Towns and Cities."

CLARK, C. J., and DOUGLAS, J., concurring in result, hold that a municipal board cannot bind the town by a contract as to necessary expenses to be incurred after their term of office shall expire. *Wadsworth v. Concord*, 587.

Where a statute provides that an election shall be held to pass upon the question whether a town shall incur the expense of an electric light system, the board of aldermen cannot contract for the establishment of such electric light system without first submitting the question to a vote of the people of the town. *Wadsworth v. Concord*, 587.

MURDER. See "Homicide."

N.

NEGLIGENCE. See "Carriers"; "Contributory Negligence"; "Damages"; "Railroads."

There is no presumption of negligence against a railroad company

NEGLIGENCE—*Continued.*

upon simple proof of injuries or death caused by its trains. *Clegg v. Railroad*, 303.

In an action for damages for delay in shipment of perishable fruit a newspaper published at the destination is admissible as proving negligence of the carrier, under an agreement permitting the use of copies of the paper on the question of the condition of the market and market value. *Parker v. Railroad*, 336.

A conductor in charge of a freight train in a railroad yard, who, while giving instructions for the movement of his train, steps on a side track without looking for other trains, is guilty of contributory negligence. *Lassiter v. Railroad*, 244.

In an action against a railroad company for the death of a freight conductor, killed by being run over by a shifting engine, the question whether the company's failure to have a watchman on the cars attached to the engine was the proximate cause of the accident is, under the evidence, for the jury. *Lassiter v. Railroad*, 244.

The evidence in this case is not sufficient to be submitted to the jury as to the negligence of the defendant in killing the decedent, and it shows that the decedent was negligent in failing to look and listen before stepping on the track of the defendant. *Pharr v. Railroad Co.*, 610.

A railroad company must notify passengers of danger if the same is or should be known to its employees. *Penny v. Railroad*, 221.

Mental anguish, though unattended with physical injury, is an element of damage in actions against telegraph companies for the non-delivery of messages. *Bryan v. Telegraph Co.*, 603.

In this action against a telegraph company for damages for delay in the delivery of a message, the facts render the company liable only for nominal damages. *Salmons v. Telegraph Co.*, 541.

The Code, sec. 1967, allowing a carrier five days within which to ship goods, does not relieve it from its common-law liability for loss caused by unreasonable delay in the shipment thereof. *Parker v. Railroad*, 335.

A common carrier cannot, by inserting in a bill of lading "subject to delay," contract against damages caused by its negligence. *Parker v. Railroad*, 335.

A complaint stating that damage by fire was caused by the careless and negligent failure to provide the engine with spark-arresters may be amended by alleging the negligence to be that

NEGLIGENCE—*Continued.*

combustible matter was allowed to accumulate on the right of way. *Simpson v. Lumber Co.*, 95.

A carrier, though accepting a shipment under a contract, "subject to delay," has the burden of showing the exercise of due diligence to avoid delay in carrying and delivering the goods. *Parker v. Railroad*, 335.

An expert must base his opinion upon facts within his own knowledge or upon the hypothesis of the finding by the jury of certain facts recited in the question. *Summerlin v. Railroad*, 550.

In this action for personal injuries the evidence is sufficient to sustain a finding that the engineer, by the exercise of due care and prudence, could have prevented the injury, notwithstanding the negligence of the plaintiff. *Marks v. Railroad*, 89.

An instruction which makes the liability of the defendant depend on its negligence, without regard to whether such negligence was the proximate cause of the injury, is erroneous. *Butts v. Railroad*, 82.

Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. *Baker v. Railroad*, 31.

In an action for damages by fire, evidence that combustible matter was allowed to remain on the right of way of a private railroad, and that a fire was burning on the right of way soon after a train had passed, is sufficient to submit to the jury on the question of the negligence of the defendant. *Simpson v. Lumber Co.*, 95.

A company operating a private railroad constructed for the purpose of removing timber conveyed to it is liable to the owner of the land for damages to his timber from fires caused by sparks from its engines igniting combustible material negligently permitted to accumulate on its right of way, to the same extent as a public railroad company. *Simpson v. Lumber Co.*, 95.

It is contributory negligence for an epileptic to walk on a railroad track. *Marks v. Railroad*, 89.

That a person listening at a crossing fails to hear the ringing of the train bell or the sounding of the whistle is some evidence that neither was done. *Butts v. Railroad*, 82.

The failure of an engineer to ring the bell or sound the whistle on

NEGLIGENCE—*Continued.*

approaching a crossing is some *evidence* of negligence. *Butts v. Railroad,* 82.

In an action to recover damages for a personal injury, it is error for the trial judge, in his instructions, to say to the jury "Was it due care to put the boy in charge of the engine without warning?" where the main question in dispute was whether the boy was in charge of the engine without having been properly warned. *Marcus v. Loane,* 54.

Where the sendee of a telegram lives outside the free delivery limits it is the duty of the telegraph company to notify the sender and demand payment or guaranty of payment of fees for delivery beyond the limits. *Bryan v. Telegraph Co.,* 603.

On the question of damages for personal injuries it is not error for the trial court to refuse to charge that they should deduct from the earning capacity losses from sickness, railroad accidents and time not employed. *Watson v. Railroad,* 188.

To aid the jury in arriving at the present value of the earning capacity of a person killed, the trial judge should give a mathematical rule for computing the same. *Watson v. Railroad,* 188.

In an action for the death of plaintiff's decedent, the issues "What was the expectancy of life of plaintiff's intestate?" and "What would have been his accumulation arising from his net income for that period?" should not be given in lieu of the issue "What damage is the plaintiff entitled to recover?" *Watson v. Railroad,* 188.

In an action to recover damages for personal injuries, it is error to instruct that if the machinery was out of order, as contended by the plaintiff, and the defect was known by the defendant, the defect constituted a continuing negligence on the part of the defendant, and it was not contributory negligence on the part of intestate of plaintiff to do what he did, without adding "if the negligence of the defendant was the proximate cause of the injury." *Marcus v. Loane,* 54.

NEGOTIABLE INSTRUMENTS. See "Banks and Banking."

Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor. *Manufacturing Co. v. Tierney,* 631.

NEGOTIABLE INSTRUMENTS—*Continued.*

The superior court has jurisdiction of an action seeking to charge the separate estate of the wife, though the note sued on is less than $200. *Harvey v. Johnson*, 353.

A note signed by husband and wife without a privy examination of the wife cannot be enforced against her separate real estate. *Harvey v. Johnson*, 353.

In an action on a note seeking to charge her personal estate, the wife and husband must be joined as parties defendant. *Harvey v. Johnson*, 352.

The superior court has no jurisdiction of an action on a note for $275; but on which the balance was less than $200. *Harvey v. Johnson*, 352.

A note signed by the husband and wife, binding her separate estate for the payment of the debt, the amount therein having been advanced for the benefit of her separate estate, is sufficient to bind her separate personal estate. *Harvey v. Johnson*, 352.

A promissory note, though not stamped with a revenue stamp as required by a federal statute, may be used in evidence. *Davis v. Evans*, 320.

Where in an action on a note executed pursuant to a contract to convey land, the jury finds that plaintiff did not contract as alleged by defendant, the refusal to instruct that if plaintiff did not complete his contract with defendant, and defendant demanded a rescission, plaintiff could not recover, is not harmful to defendant. *Joines v. Johnson*, 487.

It is not error to refuse to charge that the presumption of law that notes were the property of the payee could not be rebutted by the unsupported evidence of the payee that they were executed to him by mistake. *Sallinger v. Perry*, 35.

It is not error to refuse to charge that where it is sought to show by parol evidence that notes were executed to the payee by mistake, that the evidence should be received with great caution and the jury should look anxiously for some corroboratory facts and circumstances in support of it, and that the claimant of the note should not delay in the ascertainment of his rights, as a stale claim would merit but little attention. *Sallinger v. Perry*, 35.

It is sufficient, on the question of mistake as to the payee in a note, to charge that if the jury are thoroughly satisfied from the evidence that the draftsman of the notes made a mistake in drawing them, and that it was intended that they should be

NEGOTIABLE INSTRUMENTS—*Continued.*

made payable to the claimant and not to the payee in the notes, then they should find accordingly. *Sallinger v. Perry*, 35.

NEW TRIAL.

A new trial will not be granted in a criminal action for newly discovered testimony. *State v. Register*, 747.

Where an issue is general, embracing within its scope several distinct tracts of land, a new trial thereon must be general. *Rowe v. Lumber Co.*, 433.

The fact that a jury had an opportunity to see the locality where the homicide is alleged to have been committed, and there is no evidence that any remarks were made among the jurors themselves or the officer attending them as to the condition and appearance of the place, is not sufficient to justify the granting of a new trial, the trial judge having declined to set aside therefor a verdict of guilty. *State v. Boggan*, 761.

NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted in a criminal action for newly discovered testimony. *State v. Register*, 747.

NON-SUIT. See "Dismissal."

Where a non-suit is taken upon a demurrer to the evidence, a new action may be brought within one year. *Evans v. Alridge*, 378.

In an action to quiet title to land, an injunction having been issued to prevent the defendant from cutting timber, the plaintiff may take a non-suit, although the defendant claimed damages by reason of the injunction. *Olmsted v. Smith*, 584.

Where a defendant sets up a counter-claim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a non-suit. *Olmsted v. Smith*, 584.

In an action for the specific performance of a contract the court cannot non-suit the plaintiff, unless, admitting the evidence to be true, with all inferences favorable to plaintiff, he is not entitled to relief. *Boles v. Caudle*, 528.

It is too late after verdict upon an issue or issues of fact for a plaintiff to take a non-suit; and where the jury, after rendering a verdict, had returned to the jury room to correct a mere formal defect in the verdict, and as they retired the counsel for plaintiff informed the trial judge that the plaintiff would take a non-suit, there was no error in refusing it. *Strause v. Sawyer*, 64.

NOTICE.

A notice to an employee or book-keeper in the home office of a seller of goods is not sufficient notice of the retirement of a partner from the partnership, but must be given to the sellers themselves or their credit man. *Cowan v. Roberts*, 629.

The employment of an independent contractor to make an excavation adjacent to an abutting owner's wall does not relieve the proprietor from the obligation to give the adjacent owner timely notice of the nature and extent of the intended excavation. *Davis v. Summerfield*, 325.

A non-resident corporation, against which a default judgment was obtained after service by publication, is not entitled to have the default judgment opened on the ground that it had no notice of the pendency of the suit unless it shows that it exercised due diligence. *Turner v. Machine Co.*, 381.

O

OPINIONS. See "Supreme Court."

The filing of a written opinion in a case is discretionary with the supreme court. *Parker v. Railroad*, 335.

OPINION ON EVIDENCE. See "Experts."

In an action to recover damages for a personal injury it is error for the trial judge, in his instructions, to say to the jury "Was it due care to put the boy in charge of the engine without warning?" where the main question in dispute was whether the boy was in charge of the engine without having been properly warned. *Marcus v. Loane*, 54.

ORDINANCES. See "Towns and Cities."

A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the state for an assault. *State v. Taylor*, 755.

OUSTER.

In an action for the breach of a covenant of warranty the statute of limitations begins to run when there is an ouster of the grantee. *Shankle v. Ingram*, 254.

P

PAROL EVIDENCE. See "Evidence."

Standing trees are a part of the realty and are not the subject of

PAROL EVIDENCE—*Continued.*

parol conveyance, and any evidence thereof is not competent. *Drake v. Howell*, 162.

Where there is no evidence of the loss of a note, or that an alleged assignment thereof was in the handwriting of the payee, parol evidence is incompetent to show the assignment. *Stancill v. Spain*, 76.

The journals of the general assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. *Wilson v. Markley*, 616.

PARTIES.

No judgment can be rendered against a husband who is joined with his wife in an action under The Code, sec. 178. *Harvey v. Johnson*, 352.

The grantees of a mortgagor of a part of the land conveyed in the mortgage are necessary parties to an action for the foreclosure thereof. *Stancill v. Spain*, 76.

In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined. *Rowe v. Lumber Co.*, 433.

Where a judgment for taxes includes the poll tax of one not a party to the action, this portion will be stricken out on appeal. *Wilmington v. McDonald*, 548.

In an action on a note seeking to charge her personal estate, the wife and husband must be joined as parties defendant. *Harvey v. Johnson*, 352.

Persons not in being who may have an interest in property invested, in an action for the sale thereof and reinvestment, are not necessary parties. *Smith v. Gudger*, 627.

Where a mortgagee dies pending a suit to foreclose a mortgage, the heirs or devisees of such mortgagee are necessary parties. *Stancill v. Spain*, 76.

In an action for the sale of land for re-investment, in which there are contingent interests, it is sufficient to make parties those who would, by the happening of the contingency, have an estate therein at the time of the commencing of the action; and where the remainder may go to minors or persons not *in esse* or unknown, the court may appoint a guardian *ad litem* to represent such parties. *Hodges v. Lipscomb*, 199.

The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations. *Stancill v. Spain*, 76.

PARTITION.

The ruling of the trial court affirming the clerk in ordering actual partition of land is not reviewable. *Navigation Co. v. Worrell*, 93.

An order appointing commissioners in a partition proceeding is interlocutory, and an appeal therefrom is premature. *Navigation Co. v. Worrell*, 93.

Where the defendant in a partition proceeding fails to ask for a jury trial until after the clerk has ordered partition, he thereby waives the right thereto. *Navigation Co. v. Worrell*, 93.

PARTNERSHIP.

A notice to an employee or book-keeper in the home office of a seller of goods is not sufficient notice of the retirement of a partner from the partnership, but must be given to the sellers themselves or their credit man. *Cowan v. Roberts*, 629.

PASSENGERS. See "Carriers."

PAYMENTS. See "Tender."

The failure of a complaint in an action for non-delivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action, which may be cured by amendment. *Blalock v. Clark*, 306.

A creditor whose debt is secured by a deed of trust is entitled to payment in preference to another creditor who has a subsequent deed of trust, the funds being in the hands of a trustee under a subsequent assignment for the benefit of creditors. *Sutton v. Bessent*, 559.

Under the facts of this case, the delay in payment of the proper amount of premium is not such as to deprive the policy-holder of the right to pay that amount and have his policy continued. *Smallwood v. Insurance Co.*, 15.

Part payment by an assignee in bankruptcy of a debt referred to in the assignment does not arrest the running of the statute of limitations against the debt. *Robinson v. McDowell*, 182.

The beneficiary of a life policy, who was indebted to the estate of decedent in a greater amount than his share of the insurance money which he and the other beneficiaries allowed to be applied to the payment of a mortgage on decedent's realty, could not claim any part of the funds in the hands of the executor of decedent as creditor by reason of such payment. *Johnston v. Cutchin*, 119.

PAYMENTS—*Continued.*

The taking of clothing by the agent of a fire insurance company in part payment of the premium of a policy is a fraud upon the company, and no valid contract as to the company arises from such a transaction. *Folb v. Insurance Co.*, 179.

PERSONAL INJURY. See "Carriers"; "Negligence"; "Contributory Negligence"; "Damages."

PHYSICIANS AND SURGEONS. See "Licenses."

A contract between two physicians in a town that at a certain time one will locate elsewhere, if "the field is not larger" when the contract is to be executed than when made, is void because too indefinite. *Teague v. Schaub*, 458.

Under a special verdict finding that the defendant advertises himself as a non-medical physician, curing disease by a system of drugless healing and treating patients by such system without medicine, claiming not to cure by faith but by natural methods, without medicine or surgery; and that he administers massage, baths and physical culture, manipulates the muscles, bones, spine and solar plexus, and kneads the muscles with the fingers of the hand, writes no prescriptions as to diet, but advises his patients what to eat and what not to eat, the defendant is not guilty of practicing medicine without license though he admits that he was not licensed to practice medicine by the state medical board; that he charges fees for his services, and does not claim exemption as a nurse, midwife, or as curing by prayer. *State v. Biggs*, 729.

PLEADINGS. See "Abatement"; "Amendments"; "Demurrer"; "Exceptions and Objections"; "Indictments"; "Interpleader"; "Issues"; "Time to Plead"; "Variance."

A finding by the trial judge that the time for filing an answer has expired is conclusive, and any extension of the time is within the discretion of the court. *Wilmington v. McDonald*, 548.

The verification of pleadings must state that the same are true to the knowledge of the affiant, except as to those matters stated on information and belief, and as to those matters he believes the same to be true. *Carroll v. McMillan*, 140.

A complaint stating that damage by fire was caused by the careless and negligent failure to provide the engine with spark-arresters, may be amended by alleging the negligence to be that combustible matter was allowed to accumulate on the right of way. *Simpson v. Lumber Co.*, 95.

PLEADINGS—*Continued.*

In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. *Stancill v. Spain*, 77.

In an action to condemn land for railroad purposes the court may allow an amendment to the complaint of a better profile. *Railroad v. Newton*, 132.

Where a complaint in claim and delivery before a justice of the peace alleges the value of the property to be less than fifty dollars, and the answer does not deny the allegation, no proof of the value is necessary. *Pasterfield v. Sawyer*, 42.

In an action for divorce from bed and board, the affidavit required by section 1287 of The Code must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts therein stated. *Clark v. Clark*, 28.

In an application for alimony *pendente lite* the affidavit and petition must be verified as required by section 1287 of The Code. *Clark v. Clark*, 28.

A reference should not be ordered, after overruling a demurrer, until the pleadings are in and the parties are at issue. *Lumber Co. v. McPherson*, 287.

Where the trial judge allows a party to introduce in evidence certain parts of the pleadings of the opposite party, the latter may himself introduce so much of his own pleadings as may be necessary to explain any admission in the part offered by the other party, and the amount allowable is discretionary with the judge, except in case of palpable abuse. *Manufacturing Co. v. Steinmetz*, 182.

In an action for damages caused by delay in shipment of goods it is immaterial whether the action is brought *in assumpsit*, upon a breach of contract or in case for the violation of a common-law duty, or on a tort based on a contract. *Parker v. Railroad*, 336.

The failure of a complaint in an action for non-delivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action, which may be cured by amendment. *Blalock v. Clark*, 306.

Where the record does not show what part of a paragraph of the pleadings was offered in evidence, an exception thereto is too indefinite and will not be considered on appeal. *Clegg v. Railroad*, 303.

In an action on a note to recover the possession of mortgaged prop-

PLEADINGS—*Continued.*

erty the defendant may set up a counter-claim arising from a breach of a contract. *Lumber Co. v. McPherson*, 287.

A defendant in an action for the recovery of real property cannot show that a deed in the chain of his adversary's title, absolute in form, was a mere mortgage, unless he expressly pleads it. *Locklear v. Bullard*, 260.

It is the statement in good faith of a cause of action within the jurisdiction of the court that confers jurisdiction, and this jurisdiction, once acquired, is not lost by any subsequent elimination of the allegations of the complaint essential to its existence. *Shankle v. Ingram*, 255.

In an action for the recovery of services rendered a decedent in a special contract, where the answer sets up a different contract and the performance of the same by the decedent, the same cannot be treated as a counter-claim. *Hatcher v. Dabbs*, 239.

To allege one person to be the conductor, whose duty it was to warn a passenger of danger, and the proof shows that a different person was the conductor, is an immaterial variance. *Penny v. Railroad*, 221.

In this action against a railroad company to recover for personal injuries, the answer introduced as evidence does not admit that the decedent could not see the approaching train and was unaware of its approach. *Pharr v. Railroad*, 610.

The statue of limitations, if relied on by the accused, should be specifically brought to the attention of the trial judge by a plea or a request to instruct. *State v. Holder*, 709.

The statute of limitations can only be raised by answer. *Wilmington v. McDonald*, 548.

PREMIUM. See "Insurance."

PRESUMPTIONS.

There is no presumption of negligence against a railroad company upon simple proof of injuries or death caused by its trains. *Clegg v. Railway Co.*, 303.

It is not error to refuse to charge that the presumption of law that notes were the property of the payee could not be rebutted by the unsupported evidence of the payee that they were executed to him by mistake. *Sallinger v. Perry*, 35.

The bare fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise a presumption of fraud in the deed. *Hart v. Cannon*, 10.

PRESUMPTIONS—*Continued.*

Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. *Baker v. Railroad*, 31.

Where the plaintiff in an action for malicious prosecution was acquitted on two separate indictments, the prosecution must be identical, and the second must have been instituted without any evidence additional to that produced at the trial of the first, in order to show the absence of probable cause and to raise the presumption of malice. *Coble v. Huffines*, 422.

PRINCIPAL AND SURETY. See "Suretyship."

PRIVILEGED COMMUNICATION. See "Libel and Slander."

PROBABLE CAUSE.

Where the plaintiff in an action for malicious prosecution was acquitted on two separate indictments, the prosecutions must be identical, and the second must have been instituted without any evidence additional to that produced at the trial of the first, in order to show the absence of probable cause and to raise the presumption of malice. *Coble v. Huffines*, 422.

In an action for malicious prosecution, an order in the criminal prosecution designating defendant as the prosecutor, and taxing him with the costs, is not admissible against him either to show malice or the want of probable cause. *Coble v. Huffines*, 422.

PROCESSIONING.

In a special proceeding to determine boundary, where the defendant raises no issue of title and takes no appeal, the judgment of the clerk determining the boundary is *res judicata* in a subsequent action between the parties for cutting timber beyond the boundary so established. *Parker v. Taylor*, 103.

PROHIBITION.

A writ of prohibition is not a writ of right, but its issuance is a matter of discretion, and will not be granted to prevent the clerk of the superior court from hearing an application for the condemnation of a right of way for a railroad. *Railroad v. Newton*, 136.

PUNISHMENT.

Acts 1895, ch. 285, limiting the punishment in certain cases of lar-

PUNISHMENT—*Continued.*

ceny, is not applicable to larceny from the dwelling by breaking and entering in the day-time. *State v. Hullen*, 656.

Where a person is convicted in the superior court of an offense of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. *State v. Fritz*, 725.

PURCHASERS FOR VALUE WITHOUT NOTICE.

In attachment, an interpleader having introduced a bill of lading for the property and draft attached properly endorsed, the presumption is that the interpleader is a purchaser for value without notice. *Manufacturing Co. v. Tierney*, 630.

Q.

QUASHAL.

A defendant waives his right to object that an indictment was not returned in open court when he pleads and moves for a severance before having moved to quash the bill. *State v. Ledford*, 714.

QUESTIONS FOR COURT. See "Superior Court."

In an action against a register of deeds for issuing license for the marriage of a girl under eighteen, the facts being found by the jury or undisputed, it is for the trial court to say whether they show reasonable inquiry. *Trolinger v. Boroughs*, 312.

In an action for the specific performance of a contract, controverted facts should be submitted to the jury, but the trial judge, on the admitted facts and those found by the jury, should decide whether the plaintiff is entitled to the equitable relief demanded. *Boles v. Caudle*, 528.

In a suit for the specific performance of a contract to devise certain land, the jury having found that the land devised in the will was the same as that contracted to be devised, it became the duty of the court to construe the contract and the will for the purpose of ascertaining whether the will was a substantial execution of the terms of the contract. *Price v. Price*, 494.

QUESTIONS FOR JURY. See "Jury."

Where a deed calls for the mouth of a stream emptying into a swamp, the location thereof should be left to the jury. *Rowe v. Lumber Co.*, 433.

In an action for the specific performance of a contract, controverted facts should be submitted to the jury, but the trial judge, on

QUESTIONS FOR JURY—*Continued.*

the admitted facts and those found by the jury, should decide whether the plaintiff is entitled to the equitable relief demanded. *Boles v. Caudle*, 528.

Where a call in a deed terminates at a swamp, the question whether the edge or run of the swamp is meant is for the jury. *Rowe v. Lumber Co.*, 433.

Where the calls in a deed are ambiguous or uncertain, it is a question for the jury to decide what was meant. *Rowe v. Lumber Co.*, 433.

Whether a delay of a week was unreasonable, claimed to be due to wet weather, after the acceptance of an option to sell cotton, to go for it and tender payment, is a question for the jury. *Blalock v. Clark*, 306.

In an action against a railroad company for the death of a freight conductor, killed by being run over by a shifting engine, the question whether the company's failure to have a watchman on the cars attached to the engine was the proximate cause of the accident is, under the evidence, for the jury. *Lassiter v. Railroad*, 244.

In an action to quiet title to land, an injunction having been issued to prevent the defendant from cutting timber, the plaintiff may take a non-suit, although the defendant claimed damages by reason of the injunction. *Olmsted v. Smith*, 584.

R.

RAILROADS. See "Negligence"; "Carriers"; "Damages"; "Eminent Domain."

In the assessment of land taken for railroad purposes special benefits to the land and not benefits received in common with other property should be considered in reduction of the award for damages. *Railroad v. Platt Land*, 266.

The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. *Railroad v. Platt Land*, 266.

A telegraph line along a railroad and on the right of way thereof is an additional burden upon the land, for which the land owner is entitled to just compensation. *Hodges v. Telegraph Co.*, 225.

The road-bed and right of way of a railroad are liable to an assessment for local improvements. *Commissioners v. Railroad*, 216.

In an action by a land owner against a telegraph company for

RAILROADS—*Continued.*

damages because of the erection of poles on the right of way granted to the railroad, evidence that the telegraph line was necessary to the operation of the road is immaterial. *Hodges v. Railroad*, 225.

An injunction will not lie to restrain a railroad company from entering upon land before the appraisement of damages and the payment thereof. *Railroad v. Newton*, 132.

In an action to condemn land for railroad purposes the court may allow an amendment to the complaint of a better profile. *Railroad v. Newton*, 132.

A writ of prohibition is not a writ of right, but its issuance is a matter of discretion, and will not be granted to prevent the clerk of the superior court from hearing an application for the condemnation of a right of way for a railroad. *Railroad v. Newton*, 136.

In condemnation proceedings a land owner is not entitled at the hearing before the clerk to have issues tried by a jury. *Railroad v. Newton*, 132.

A company operating a private railroad constructed for the purpose of removing timber conveyed to it is liable to the owner of the land for damages to his timber from fires caused by sparks from its engines igniting combustible material negligently permitted to accumulate on its right of way, to the same extent as a public railroad company. *Simpson v. Lumber Co.*, 95.

REASONABLE DOUBT.

In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the state to show beyond a reasonable doubt the intent to defraud. *State v. McDonald*, 680.

RECEIVERS.

The allowance of commissions and counsel fees to a receiver by the superior court is *prima facie* correct, and the supreme court will alter the same only when they are clearly inadequate or excessive. *Graham v. Carr*, 449.

RECEIVING STOLEN GOODS.

Where an indictment charges in one count larceny and in another the receiving of stolen goods, and the instructions relate only to the first count, and the defendant is found guilty on the second count, a new trial will be granted. *State v. Adams*, 667.

RECORD. See "Appeal."

The successful party on appeal from the superior court is entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. *Dobson v. Railroad Co.*, 624.

Where the record and briefs are not printed within the time prescribed by Supreme Court Rules 30 and 34 the appeal will be dismissed. *Stroud v. Telegraph Co.*, 253.

RECORDATION. See "Deeds."

Where a deed is recorded in the county where the land is situated, and the county is afterwards divided, it is not necessary to register the deed in the new county, though the land lies therein. *Bivings v. Gosnell*, 574.

REFERENCES.

A reference should not be ordered, after overruling a demurrer, until the pleadings are in and the parties are at issue. *Lumber Co. v. McPherson*, 287.

Where the plaintiff excepts to a compulsory reference, an objection taken for the first time on appeal to the technical form of asking submission of issues arising "on the report" instead of "on the pleadings" will not be considered. *Kerr v. Hicks*, 175.

An appeal from a judgment on the report of a referee overruling exceptions thereto will be treated as an exception to the judgment based upon the conclusion of fact by the referee. *Miller v. Coxe*, 578.

A finding by a referee that a guardian rented the lands of the ward privately, and that the interest of the ward did not require a public rental thereof, is a conclusion of law. The referee should have found whether any injury came to the ward by the private rental. *Duffy v. Williams*, 195.

REGISTER OF DEEDS.

The evidence in this case is not sufficient to show reasonable inquiry by a register of deeds as to the legal age of a woman to marry. *Trolinger v. Boroughs*, 312.

In an action against a register of deeds for issuing license for the marriage of a girl under eighteen, the facts being found by the jury or undisputed, it is for the trial court to say whether they show reasonable inquiry. *Trolinger v. Boroughs*, 312.

REHEARINGS. See "Supreme Court."

Upon a rehearing the supreme court will not consider any point not

REHEARINGS—*Continued.*

certified as erroneous by counsel making the certificate. *Kerr v. Hicks*, 175.

RELEASE.

Where a person assigns stock in blank and allows another person to use the same as collateral without any knowledge on the part of the person to whom given as collateral as to any conditions relative to the assignment, is not released by an extension of time in payment of the debt for which it is collateral. *Cox v. Dowd*, 537.

REMAINDERS.

Persons not in being who may have an interest in property invested, in an action for the sale thereof and reinvestment are not necessary parties. *Smith v. Gudger*, 627.

The clerk of the superior court has no jurisdiction of an action to sell property for reinvestment, etc., under acts 1903, ch. 99, but when carried to the superior court on appeal it will be retained for a hearing. *Smith v. Gudger*, 627.

Under the provisions of the deed as set out in this case, two of the grantees, after the death of the other grantee, without issue, and the death of the grantor, can make a fee-simple title to the land in controversy. *Gray v. Hawkins*, 1.

In an action for the sale of land for re-investment, in which there are contingent interests, it is sufficient to make parties those who would, by the happening of the contingency, have an estate therein at the time of the commencing of the action; and where the remainder may go to minors or persons not *in esse* or unknown, the court may appoint a guardian *ad litem* to represent such parties. *Hodges v. Lipscomb*, 199.

REMOVAL OF CAUSES.

The facts as stated in this case do not amount to the removal of a certain criminal case from the county in which the indictment was found. *State v. Ledford*, 714.

An objection to the venue in that a case had been improperly removed from one county to another must be taken by a plea in abatement, not by a motion in arrest of judgment. *State v. Ledford*, 714.

RES GESTAE. See "Evidence."

Where a person indicted for murder procured a witness to aid in the commission of the homicide, statements made by him to the wit-

RES GESTAE—*Continued.*

ness at the time are competent as a part of the *res gestae. State v. Register*, 747.

In an action against a carrier for failure to protect a passenger against an assault at a station, the evidence by a witness that he told the person assaulted immediately after the assault that an employee of the carrier took part in the assault is competent as part of the *res gestae. Seawell v. Railroad*, 515.

RESTRAINING ORDER. See "Injunction."

RESTRAINT OF TRADE.

A contract between two physicians in a town that at a certain time one will locate elsewhere, if "the field is not larger" when the contract is to be executed than when made, is void because too indefinite. *Teague v. Schaub*, 458.

ROBBERY.

In a prosecution for highway robbery, it is error in the trial judge to ask in his instructions: "Were the defendants concealed in the bushes near the public highway?" etc., there being no evidence of such facts. *State v. Graham*, 645.

RULES OF COURT. See "Superior Court"; "Supreme Court."

Where on appeal an exception is not referred to in the brief of appellant, it will be taken as abandoned. *State v. Register*, 747.

Upon a rehearing the supreme court will not consider any point not certified as erroneous by counsel making the certificate. *Kerr v. Hicks*, 175.

Where the record and briefs are not printed within the time prescribed by Supreme Court Rules 30 and 34 the appeal will be dismissed. *Stroud v. Telegraph Co.*, 253.

The issue, "What damages, if any, plaintiff is entitled to recover," in an action for the recovery for services rendered a decedent under a special contract, does not present to the jury all the matters in controversy. *Hatcher v. Dabbs*, 239.

The waiver of a jury trial by consent, or that judgment may be entered out of term, must be in writing, filed with the papers in the case, or by oral consent entered on the minute docket of the court. *Hahn v. Brinson*, 7.

An appeal will be dismissed for failure of appellant to file printed brief on Tuesday of the week preceding the call of the district to which the cause belongs, unless, for good cause shown, the court shall give further time to print the brief. *Calvert v. Carstarphen*, 25.

S.

SALARIES AND FEES. See "Commissions"; "Costs."

A state cannot tax the salary of a federal officer. *Purnell v. Page*, 125.

SALES. See "Bills of Lading"; "Fraudulent Conveyances"; "Warranty."

A refusal to deliver an article sold, because the price had gone up, makes it unnecessary to tender the price. *Blalock v. Clark*, 306.

The failure of a complaint in an action for non-delivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action, which may be cured by amendment. *Blalock v. Clark*, 306.

In an action for the sale of land for re-investment, in which there are contingent interests, it is sufficient to make parties those who would, by the happening of the contingency, have an estate therein at the time of the commencing of the action; and where the remainder may go to minors or persons not *in esse* or unknown, the court may appoint a guardian *ad litem* to represent such parties. *Hodges v. Lipscomb*, 199.

Where the owner of lumber authorizes a creditor in possession thereof to sell it and pay himself, such transaction constitutes a present sale of the lumber and passes title, freed from the lien of an unregistered mortgage. *McArthur v. Mathis*, 142.

SELF-DEFENSE. See "Homicide."

Where, on a prosecution for murder, the court charged that defendant was justified in meeting force with force, it was error to add, "But you are to judge of the force necessary, and not the prisoner," since the jury should merely find whether he did more than a reasonable man should have done. *State v. Castle*, 769.

On a prosecution for murder, it was error to charge that it was incumbent on defendant to first use gentle and mild means, and that if he used more force than was necessary and the deceased could have been ejected without it, he would be guilty of murder in the second degree, since the instruction made the right of self-defense turn on the necessity for the force used, without reference to whether it reasonably appeared necessary. *State v. Castle*, 770.

SERVICE OF PROCESS.

In an action to recover land purchased under a judgment recovered against defendant's non-resident grantor, plaintiff could not

SERVICE OF PROCESS—*Continued.*

recover, in the absence of proof of the grantor's personal appearance or publication of summons after attachment. *Evans v. Alridge*, 378.

An officer of a foreign corporation, while in the state attending a judicial sale to which his company is a party, is not exempt from service of summons in an action against the corporation. *Greenleaf v. Bank*, 292.

A non-resident attorney in the state to represent his clients in a matter pending in the federal court is not privileged from service of summons. *Greenleaf v. Bank*, 292.

SOLICITOR.

In a criminal case an appellant must tender to the solicitor of the district where the case is tried a statement of the case on appeal for acceptance or rejection, and the acceptance of service of such statement by an attorney appearing for the private prosecutor is insufficient. *State v. Clenny*, 662.

SPECIAL PROCEEDINGS.

Where the grantor, after making an assignment for the benefit of creditors, dies, his personal representative and the trustee may join in a special proceeding before the clerk to sell the real estate to pay debts. *Robinson v. McDowell*, 182.

SPECIAL VENIRE.

A finding by the trial judge that persons drawn on a special venire were not freeholders is conclusive on appeal. *State v. Register*, 746.

Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a juror selected from a special venire ordered in the case. *State v. Register*, 747.

SPECIFIC PERFORMANCE.

Where a devisee seeks the specific performance of a contract to devise certain land, executed on the compromise of a certain suit, the record in such suit is not admissible in evidence. *Price v. Price*, 494.

In an action for the specific performance of a contract, controverted facts should be submitted to the jury, but the trial judge, on the admitted facts and those found by the jury, should decide whether the plaintiff is entitled to the equitable relief demanded. *Boles v. Caudle*, 528.

In an action for the specific performance of a contract, the court

SPECIFIC PERFORMANCE—*Continued.*

cannot non-suit the plaintiff, unless, admitting the evidence to be true, with all inferences favorable to plaintiff, he is not entitled to relief. *Boles v. Caudle*, 528.

Where a contract to convey an interest in property is based on a fair consideration, is not procured by undue influence, its enforcement will not be oppressive and it has been partially performed, its specific performance will be decreed. *Boles v. Caudle*, 528.

A contract to devise land in consideration of the settlement of a family controversy relative to certain lands is valid and may be enforced in a court of equity. *Price v. Price*, 494.

In a suit for the specific performance of a contract to devise certain land, the jury having found that the land devised in the will was the same as that contracted to be devised, it became the duty of the court to construe the contract and the will for the purpose of ascertaining whether the will was a substantial execution of the terms of the contract. *Price v. Price*, 494.

A devisee, seeking specific performance of a contract to devise lands, cannot be required to elect whether he will take under the will or under the contract. *Price v. Price*, 495.

In a suit against devisees and executors for specific performance of a contract to devise certain land, it is proper to submit to the jury whether testator devised the land as he contracted. *Price v. Price*, 494.

Under the provisions of the deed as set out in this case, two of the grantees, after the death of the other grantee, without issue, and the death of the grantor, can make a fee-simple title to the land in controversy. *Gray v. Hawkins*, 1.

STATUTES. See "Acts"; "Statutes"; "The Code."

A copy of the journal of the legislature deposited with the secretary of state is not evidence for any purpose, and a misnomer of a town in a private act therein does not affect the validity of the act. *Wilson v. Markley*, 616.

The journal of the legislature is competent evidence only for the purpose of ascertaining whether a law had been passed in accordance with the constitution, article 2, section 14, requiring it to be read three times on three different days in each house and the yeas and nays to be entered on the second and third readings. *Wilson v. Markley*, 616.

STOCK LAW. See "Fences."

Acts 1903, ch. 554, if regarded as an act authorizing the imposition

STOCK LAW—*Continued.*

of special assessments, is invalid, because it authorizes assessments on the real estate of the entire county, including the real estate of the township withdrawn from the benefits of the stock law, and which would receive no benefits from the fences erected by the commissioners. *Harper v. Commissioners*, 106.

Acts 1903, ch. 554, cannot be held valid so far as it authorizes the commissioners to erect fences when necessary and to draw out of the general fund of the county money to pay for the same, and invalid so far as it authorizes the imposition of a tax or assessment to replace the money so used, for the court cannot presume that the legislature would have directed the expense of building the fences to be taken out of the general fund without also making provision for replacing the money withdrawn. *Harper v. Commissioners*, 106.

Acts 1903, ch. 554, being an act supplemental to acts 1903, ch. 56, repealing the stock law in a township in New Hanover county, and providing that the commissioners of the county shall fence where necessary and defray the expenses from the general fund in the county treasury, and thereafter levy on all taxable real estate in the county a tax sufficient to replace the amount drawn out of the general fund, if regarded as authorizing a tax, violates the constitution, art. 7, sec. 9, directing that "all taxes levied by any county * * * shall be uniform and *ad valorem* upon all property" in the county. *Harper v. Commissioners*, 106.

The Code, sec. 2824, providing that for the purpose of building stock law fences the county commissioners may levy a special assessment on all taxable real estate "within the county, township or district which may adopt the stock law," does not authorize the imposition of an assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners. *Harper v. Commissioners*, 107.

STOCKS.

Where a *feme sole* assigns stock in blank and after marriage new stock is issued to her, and she assigns the same to the same parties without assuming control thereof, such assignment is valid without the consent of the husband. *Cox v. Dowd*, 537.

Where a person assigns stock in blank and allows another person to use the same as collateral, without any knowledge on the part

STOCKS—*Continued.*

of the person to whom given as collateral as to any conditions relative to the assignment, is not released by an extension of time in payment of the debt for which it is collateral. *Cox v. Dowd*, 537.

Acts 1885, ch. 265, authorizing a corporation to hold in escrow a new in lieu of a lost certificate of stock, is repealed by acts 1901, ch. 2, sec. 95. *Travers v. Railroad*, 322.

SUBROGATION.

Where the beneficiaries of a life policy allowed the proceeds thereof to be applied to the payment of a mortgage on decedent's realty, as directed by decedent's will, they were entitled to the funds in the hands of the executor of decedent as creditors by reason of the payment of their insurance money on the mortgage debt. *Johnston v. Cutchin*, 119.

SUMMONS. See "Service of Process."

A summons served on a telegraph company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time. *Bryan v. Telegraph Co.*, 603.

SUPERIOR COURT. See "Rules of Court."

The superior court has no jurisdiction of an action on a note for $275; but on which the balance was less than $200. *Harvey v. Johnson*, 352.

Where there is an indictment in the superior court for an offense of which it has original jurisdiction, and a lesser offense is proved, it will retain jurisdiction, although it does not have original jurisdiction of the lesser offense. *State v. Fritz*, 725.

Where a person is convicted in the superior court of an offense of which a justice of the peace has jurisdiction, the punishment cannot exceed that which a justice of the peace could impose. *State v. Fritz*, 725.

It is the statement in good faith of a cause of action within the jurisdiction of the court that confers jurisdiction, and this jurisdiction, once acquired, is not lost by any subsequent elimination of the allegations of the complaint essential to its existence. *Shankle v. Ingram*, 255.

Under The Code, secs. 404, 921, acts 1901, chs. 28, 29, and acts 1903, ch. 533, a grand jury may be summoned for the term of the superior court for New Hanover county held on the fifth Monday after the first Monday in March. *State v. Lew*, 664.

SUPERIOR COURT—*Continued.*

Where by reason of the accumulation of criminal business a special term of the superior court is called, an indictment found at the special term may be tried during that term, and it is not error to refuse to continue the case for that reason. *State v. Register*, 746.

SUPREME COURT. See "Rules of Court"; "Opinions"; "Rehearings."

The filing of a written opinion in a case is discretionary with the supreme court. *Parker v. Railroad*, 335.

The successful party on appeal from the superior court is entitled to recover back the costs of the transcript and certificate, though subsequently final judgment is rendered in the lower court against him. *Dobson v. Railroad Co.*, 624.

A motion to dismiss an action for trespass for failure to make an administrator a party thereto cannot be made in the supreme court. *Rowe v. Lumber Co.*, 433.

SURETYSHIP.

Where a person assigns stock in blank and allows another person to use the same as collateral without any knowledge on the part of the person to whom given as collateral as to any conditions relative to the assignment, is not released by an extension of time in payment of the debt for which it is collateral. *Cox v. Dowd*, 537.

Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. *Miller v. Coxe*, 578.

T.

TAX TITLES.

A purchaser claiming land under a sale for internal revenue taxes against the owner cannot sustain his title under the deed of the collector if he fails to show independently of the mere recitals in the record or in his deed that a return was made by the person liable to be assessed, or that the commissioner of internal revenue had made the assessment, or that a warrant of distraint had been issued, or that a certificate of purchase had been given to the purchaser at the sale. *Stewart v. Pergusson*, 276.

TAXATION.

A state cannot tax the salary of a federal officer. *Purnell v. Page*, 125.

Where a judgment for taxes includes the poll tax of one not a party

TAXATION—*Continued.*

to the action, this portion will be stricken out on appeal. *Wilmington v. McDonald,* 548.

A judgment for taxes should include interest on the amount due. *Wilmington v. McDonald,* 548.

The road-bed and right of way of a railroad are liable to an assessment for local improvements. *Commissioners v. Railroad,* 216.

An assessment levied by county commissioners for the purpose of local taxation, based upon the valuation of the corporation commission, cannot be sustained. *Commissioners v. Railroad,* 216.

A tax payer may maintain an injunction to prevent the sale of his property under an illegal tax, or he may pay the tax under protest and sue to recover it. *Purnell v. Page,* 125.

Acts 1903, ch. 554, if regarded as an act authorizing the imposition of special assessments, is invalid, because it authorizes assessments on the real estate of the entire county, including the real estate of the township withdrawn from the benefits of the stock law, and which would receive no benefits from the fences erected by the commissioners. *Harper v. Commissioners,* 106.

Acts 1903, ch. 554, being an act supplemental to Acts 1903, ch. 56, repealing the stock law in a township in New Hanover county, and providing that the commissioners of the county shall fence where necessary and defray the expenses from the general fund in the county treasury, and thereafter levy on all taxable real estate in the county a tax sufficient to replace the amount drawn out of the general fund, if regarded as authorizing a tax, violates the constitution, art. 7, sec. 9, directing that "all taxes levied by any county * * * shall be uniform and *ad valorem* upon all property" in the county. *Harper v. Commissioners,* 106.

The Code, sec. 2824, providing that for the purpose of building stock law fences the county commissioners may levy a special assessment on all taxable real estate "within the county, township or district which may adopt the stock law," does not authorize the imposition of an assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners. *Harper v. Commissioners,* 107.

An act which provides that where the owner of swamp land, his heirs or assigns, fail to pay all arrearages of taxes levied and

TAXATION—*Continued.*

assessed thereon, or which ought to have been levied on or before a certain date, and that such land shall be forfeited to and vested in the state, without any judicial proceeding, is unconstitutional. *Parish v. Cedar Co.*, 478.

TELEGRAPHS. See "Carriers"; "Damages"; "Negligence"; "Railroads."

In an action against a telegraph company for the erection of poles on the land of plaintiff, it is error to instruct that in addition to permanent damages the land owner was entitled to recover for damages to crops. *Hodges v. Railroad*, 225.

A telegraph line along a railroad and on the right of way thereof is an additional burden upon the land, for which the land owner is entitled to just compensation. *Hodges v. Telegraph Co.*, 225.

In this action against a telegraph company for damages for delay in the delivery of a message, the facts render the company liable only for nominal damages. *Salmons v. Telegraph Co.*, 541.

The liability for non-delivery of a telegram in another state under a contract made in this state is determined by the law of the latter state. *Bryan v. Telegraph Co.*, 603.

Where the sendee of a telegram lives outside the free delivery limits it is the duty of the telegraph company to notify the sender and demand payment or guaranty of payment of fees for delivery beyond the limits. *Bryan v. Telegraph Co.*, 603.

A summons served on a telegraph company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time. *Bryan v. Telegraph Co.*, 603.

Mental anguish, though unattended with physical injury, is an element of damage in actions against telegraph companies for the non-delivery of messages. *Bryan v. Telegraph Co.*, 603.

In an action by a land owner against a telegraph company for damages because of the erection of poles on the right of way granted to the railroad, evidence that the telegraph line was necessary to the operation of the road is immaterial. *Hodges v. Telegraph Co.*, 225.

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. *Hodges v. Telegraph Co.*, 225.

TENANCY IN COMMON.

An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the co-tenant then out of possession. *Locklear v. Bullard*, 250.

TENDER. See "Payments."

Whether a delay of a week was unreasonable, claimed to be due to wet weather, after the acceptance of an option to sell cotton, to go for it and tender payment, is a question for the jury. *Blalock v. Clark*, 306.

A refusal to deliver an article sold, because the price had gone up, makes it unnecessary to tender the price. *Blalock v. Clark*, 306.

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Sec. 3811. Arrest. *Sossamon v. Cruse*, 470.
Sec. 3818. Towns and Cities. *State v. Taylor*, 755.
Sec. 3820. Towns and Cities. *State v. Taylor*, 755.

TIME.

An option given February 7th, provided no better offer was received that day by mail, to close "by 8 February," includes the latter day. *Blalock v. Clark*, 306.

TIME TO PLEAD. See "Pleadings."

A finding by the trial judge that the time for filing an answer has expired is conclusive, and any extension of the time is within the discretion of the court. *Wilmington v. McDonald*, 548.

TORTS. See "Actions"; "Damages."

In an action for damages caused by delay in shipment of goods it is immaterial whether the action is brought *in assumpsit*, upon a breach of contract or in case for the violation of a common-law duty, or on a tort based on a contract. *Parker v. Railroad*, 336.

TOWNS AND CITIES. See "Municipal Corporations"; "Ordinances."

Where a statute provides that an election shall be held to pass upon the question whether a town shall incur the expense of an electric light system, the board of aldermen cannot contract for the establishment of such electric light system without first submitting the question to a vote of the people of the town. *Wadsworth v. Concord*, 587.

TOWNS AND CITIES—*Continued.*

A policeman who makes an arrest without a warrant outside the corporate limits of a town for the breach of an ordinance is guilty of an assault. *Sossamon v. Cruse*, 470.

CLARK, C. J., and DOUGLAS, J., concurring in result, hold that a municipal board cannot bind the town by a contract as to necessary expenses to be incurred after their term of office shall expire. *Wadsworth v. Concord*, 587.

TRESPASS.

While excessive force may not be used in removing a trespasser, the owner of the premises may use sufficient force under all the circumstances to remove him. *State v. Crook*, 672.

An action for trespass for cutting and removing timber from land cannot be maintained by one not in actual or constructive possession thereof. *Drake v. Howell*, 162.

The grantee of land cannot maintain an action for damages for a trespass committed before he became the owner thereof. *Drake v. Howell*, 163.

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. *Hodges v. Telegraph Co.*, 225.

In an action against a telegraph company for the erection of poles on the land of plaintiff, it is error to instruct that in addition to permanent damages the land owner was entitled to recover for damages to crops. *Hodges v. Telegraph Co.*, 225.

Where, in an action for trespass in cutting timber, plaintiff failed to prove that he was in actual possession or that he had legal title to the trees, defendants were not estopped from denying plaintiff's title by two deeds by plaintiff and another, conveying the right to cut the timber to defendants, under one of which defendants' rights had expired by limitation before any attempt had been made to cut the timber, and the other never having been delivered. *Drake v. Howell*, 163.

TRIAL. See "Actions"; "Arguments of Counsel"; "Continuances"; "Exceptions and Objections"; "Findings of Court"; "Issues"; "Nonsuit"; "Pleadings"; "Questions for Court"; "Questions for Jury"; "Removal of Causes"; Time to Plead"; "Witnesses."

Where the defendant, in an appeal from a justice of the peace, fails to appear in the superior court, having answered and raised a material issue, no judgment can be entered against him without a trial. *Barnes v. Railroad*, 130.

TRUSTS.

Where land is conveyed to a trustee, who is to pay the rents to a married woman, the wife of the grantor, the *cestui que trust* may compel the conveyance of the legal estate to herself at any time, and hence the trustee is not liable for rents and profits received by the husband of the *cestui que trust*. *Perkins v. Brinkley*, 154.

Where it is discretionary with the trustee in a deed of trust as to the time of the sale of property therein assigned, the same may be sold, though the debts secured are barred by the statute of limitations. *Robinson v. McDowell*, 182.

In a suit by a *cestui que trust* for rents due from the trustee, testimony as to a settlement of the boundaries between plaintiff and grantor's children is inadmissible where defendant had taken possession of and rented the land. *Perkins v. Brinkley*, 348.

TRUST DEEDS.

An assignment for the benefit of creditors, preferring a creditor secured by a deed of trust on the same property, does not provide for a real preference within the act of 1893, requiring the filing of a schedule of preferred debts. *Sutton v. Bessent*, 559.

U

UNDUE INFLUENCE. See "Fraud"; "Mistake."

Where a contract to convey an interest in property is based on a fair consideration, is not procured by undue influence, its enforcement will not be oppressive and it has been partially performed, its specific performance will be decreed. *Boles v. Caudle*, 528.

It is sufficient to charge, as to undue influence or fraud, that the law scrutinizes transactions between guardian and ward, and that the burden is on the guardian to show that all his transactions with his ward are fair. *Hart v. Cannon*, 10.

USURY. See "Interest."

Where an action is brought to restrain a sale under a mortgage on account of alleged usury, and it is removed to the federal court and the amount in controversy is adjudicated, the judgment therein is a bar to a subsequent action by the mortgagor for alleged usury in the mortgage. *Best v. Mortgage Co.*, 20.

V

VARIANCE.

To allege one person to be the conductor, whose duty it was to warn a passenger of danger, and the proof shows that a different per-

VARIANCE—*Continued.*

son was the conductor, is an immaterial variance. *Penny v. Railroad*, 221.

VENDOR AND PURCHASER.

An endorsement on the back of a deed, properly acknowledged, that for value received the grantee in the deed conveys to A all the right and title vested in him by virtue of the said deed, conveys no title. *Joines v. Johnson*, 487.

VENUE. See "Jurisdiction."

The facts as stated in this case do not amount to the removal of a certain criminal case from the county in which the indictment was found. *State v. Ledford*, 714.

An objection to the venue in that a case had been improperly removed from one county to another must be taken by a plea in abatement, not by a motion in arrest of judgment. *State v. Ledford*, 714.

An objection to venue is waived unless taken in apt time by a plea in abatement. *State v. Holder*, 709.

VERDICT.

Either party to a civil action is entitled to have the jury polled. *Smith v. Paul*, 66.

Where the trial court sustains a plea of former conviction and enters a judgment of not guilty, without striking out the jury's verdict of guilty, it may, on reversal, proceed to enter judgment of conviction. *State v. Taylor*, 755.

Where the court sustains a plea of former conviction after the jury has returned a verdict of guilty, the proper practice is to strike out the verdict and sustain the plea as upon a demurrer by the state; and to enter a judgment of not guilty on the verdict as rendered is improper. *State v. Taylor*, 755.

Where there is more than one count in a bill of indictment, and there is a general verdict, the verdict is on each count, and if there is a defect in one or more of the counts the verdict will be imputed to the sound count. *State v. Holder*, 709.

W

WAIVER.

The holder of a policy of insurance does not waive the right to sue for the premiums paid on the policy by paying premiums on the amount to which such policy had been illegally reduced if he objected to the reduction. *Makely v. Legion of Honor*, 367.

WAIVER—*Continued.*

The failure to file proofs of loss within the time required by a policy does not work a forfeiture thereof, but unless waived by the company no action can be brought until the expiration of the required time after the filing of the proofs. *Gerringer v. Insurance Co.*, 407.

The denial of liability by a fire insurance company dispenses with the necessity of filing proofs of loss. *Gerringer v. Insurance Co.*, 407.

An objection to venue is waived unless taken in apt time by a plea in abatement. *State v. Holder*, 709.

The waiver of a jury trial by consent, or that judgment may be entered out of term, must be in writing, filed with the papers in the case, or by oral consent entered on the minute docket of the court. *Hahn v. Brinson*, 7.

Where the defendant in a partition proceeding fails to ask for a jury trial until after the clerk has ordered partition, he thereby waives the right thereto. *Navigation Co. v. Worrell*, 93.

A defendant waives his right to object that an indictment was not returned in open court when he pleads and moves for a severance before having moved to quash the bill. *State v. Ledford*, 714.

The failure to base proceedings as for contempt on affidavit is waived by the contemnor being sworn and making answer to the contempt. *In re Odum*, 250.

WARRANT.

In an action for malicious prosecution it is not necessary to show that the defendant company swore out the warrant, it being sufficient if it directly or indirectly procured it to be issued. *Kelly v. Traction Co.*, 418.

WARRANTY.

In an action for the breach of a covenant of warranty the statute of limitations begins to run when there is an ouster of the grantee. *Shankle v. Ingram*, 254.

In an action for damages for breach of covenant of seizin the statute of limitations begins to run upon delivery of the deed. *Shankle v. Ingram*, 254.

WATERS AND WATER-COURSES.

In an action for damages for the temporary obstruction of a waterway, the measure thereof is the loss of crops occasioned thereby up to the time of the bringing of the suit. *Jones v. Kramer*, 446.

WIDOW.

Where a widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance, such action is not maintainable. *Perkins v. Brinkley*, 86.

WILLS. See "Legacies and Devises."

Where the beneficiaries of a life policy allowed the proceeds thereof to be applied to the payment of a mortgage on decedent's realty, as directed by decedent's will, they were entitled to the funds in the hands of the executor of decedent as creditors by reason of the payment of their insurance money on the mortgage debt. *Johnston v. Cutchin*, 119.

The heirs of a testator, and not the residuary legatees, take property included in a lapsed specific devise, unless it appears that the testator intended it otherwise. *Holton v. Jones*, 399.

Where realty is devised to a person and her children during their lifetime and then to go to her grandchildren, on default of grandchildren *in esse* at the death of testator the fee vests in the heirs at law of the testator to the use of any grandchildren who might thereafter be born. *Holton v. Jones*, 399.

Where a testator contracts to devise certain lands to his children, "with limitations," he may attach such limitations as are in his judgment proper. *Price v. Price*, 494.

In a suit by a devisee for the specific performance of a contract to devise land, evidence as to what land the devisee had in possession, when and where it had been surveyed, and other evidence of like character, is admissible to locate the land received by the said devisee under the will. *Price v. Price*, 494.

Where a devisee seeks the specific performance of a contract to devise certain land, executed on the compromise of a certain suit, the record in such suit is not admissible in evidence. *Price v. Price*, 494.

The beneficiary of a life policy, who was indebted to the estate of decedent in a greater amount than his share of the insurance money which he and the other beneficiaries allowed to be applied to the payment of a mortgage on decedent's realty, could not claim any part of the funds in the hands of the executor of decedent as creditor by reason of such payment. *Johnston v. Cutchin*, 119.

A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. *Perkins v. Brinkley*, 86.

Where a widow fails to dissent to a will and brings an action after

WILLS—*Continued.*

six months from the probate thereof for a year's allowance, such action is not maintainable. *Perkins v. Brinkley*, 86.

A will expressly excluding the children of the testator born after the execution thereof makes a provision for them under The Code, sec. 2145, and such children do not share in the estate as though the testator had died intestate. *Thomason v. Julian*, 309.

WITNESSES. See "Impeachment of Witnesses."

Where a prosecuting witness is asked as to a conversation and denies it, the answer to which would be calculated to show the temper and disposition of the witness, the defendant is entitled to show that the declaration was made, though the time was not the same as that stated to the witness. *State v. Crook*, 672.

An indictment against a witness who had turned state's evidence is not admissible to impeach him. *State v. Register*, 747.

It is error to instruct the jury that because of interest they should carefully scrutinize the evidence of defendants, *without adding* that if the jury believe the evidence it should have the same weight as if the witness was not interested. *State v. Graham*, 645.

Where a witness has testified as an expert to several material matters, a general objection to a particular question thereafter is insufficient to raise the question of his competency as an expert. *Summerlin v. Railroad*, 551.

Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. *State v. Simpson*, 676.

The privilege of refusing to answer an incriminating question is personal to the witness, and can be claimed by him only. *State v. Morgan*, 743.

In a prosecution for gaming a witness may be compelled to testify although his answer tends to criminate him, he being pardoned for the offense under The Code, sec. 1215. *State v. Morgan*, 743.

The admissions of a prosecuting witness are admissible against him on another trial for the same or any other offense. *State v. Simpson*, 676.

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